Supreme Court, U.S.
FILED

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No. ____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

PIERRE E. DOSTERT,
Petitioner,

v.

SUPREME COURT OF APPEALS OF WEST VIRGINIA

and

WEST VIRGINIA WORKERS' COMPENSATION DIVISION,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the refusal of the Supreme Court of Appeals of West Virginia to order the recusal in this case, to which it is a party, of all sitting, past and retired judges of that court and to appoint replacements from a roster of retired West Virginia circuit judges, pursuant to a procedure recognized under the constitution of that state, denied the petitioner his right to due process under the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

The petitioner in this case is Pierre E. Dostert, a former circuit court judge in and individual resident of West Virginia. The respondents are the Supreme Court of Appeals of West Virginia and the West Virginia Workers' Compensation Division.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Pierre E. Dostert, proceeding pro se, hereby requests this Court to issue a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS BELOW

The opinion and order of the Supreme Court of Appeals of West Virginia denying Dostert's motion for disqualification of all sitting, past and retired justices of that court from hearing his case, and denying his motion for leave to file his petition for appeal, time having expired (App. at 1a), which effectively affirmed the rulings of the

West Virginia Workers' Compensation Appeal Board against him (App. at 4a, 6a), are not reported. The order of the Supreme Court of Appeals denying Dostert's motion for reconsideration (App. 40a) is not reported. The opinion and order of the West Virginia Workers' Compensation Appeal Board, both in the original (App. at 6a) and as corrected (App. at 4a), are not reported. The opinion and order of the West Virginia Workers' Compensation Office of Judges, both in the original (App. at 26a) and as corrected (App. at 8a), are not reported. The orders of the West Virginia Workers' Compensation Fund (App. at 33a and 35a) are not reported. The original opinion and order of the Supreme Court of Appeals of West Virginia finding that Dostert suffers from a compensable condition (App. at 37a) are not reported.

GROUNDS FOR JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on January 8, 1997. The Supreme Court of Appeals denied an untimely motion for reconsideration (App. 58a) on March 20, 1997 (App. 40a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Several provisions of the West Virginia Constitution (Art. 8, §§ 2, 8), West Virginia Code (§§ 23-5-6, 23-5-15), and West Virginia Rules of Appellate Procedure (Rules 2, 16(b), 24(a)) are also involved in establishing jurisdiction in this Court. The relevant provisions are set forth in the Appendix at 42a-49a.

STATEMENT OF THE CASE

Former West Virginia circuit judge Pierre E. Dostert, the petitioner, has sought a ruling of disability and an award of workers' compensation benefits since before his

purported former employer, the Supreme Court of Appeals of West Virginia, held in 1988 that he had made a compensable claim based on a heart-related condition. App. at 37a. After remand by that court, Dostert's claim for disability—to which the Supreme Court of Appeals is itself a party—was denied at all levels of administrative review in the West Virginia workers' compensation system and was opposed by the same Supreme Court of Appeals at each level over a painful period of nine years. App. at 1a-36a, 40a-41a.

The Supreme Court of Appeals this year acted to end the matter on a purely procedural basis, denying his motion for disqualification of all sitting, past and retired justices of the Supreme Court of Appeals and dismissing as untimely Dostert's petition for appeal from an adverse decision of the West Virginia Workers Compensation Appeals Board. App. 1a, 40a. This kafkaesque matter is now before the U.S. Supreme Court.

The central issue here is whether a court may rule on an appeal in a case to which it is a party without recusing its membership from participation in the matter where the means to do so exist and are well-recognized. Dostert contends that in this case the Supreme Court of Appeals of West Virginia applied state law in an inconsistent and plainly incorrect manner to reject his petition for appeal as out of time and denied him federal due process of law in doing so without recusing its justices as provided for by the state constitution. The question takes on added significance in a case that involves Dostert, who has previously been involved in litigation against the Supreme Court of Appeals and others in the West Virginia system of justice on numerous occasions.

A. Procedural Background

Dostert was a circuit court judge in West Virginia from 1977 through 1984. App. 9a. His tenure was a tumultuous one which generated some 17 lawsuits in which he

was a named party before the West Virginia Supreme Court of Appeals. *See id.*; *Carey v. Dostert*, 185 W.Va. 247, 406 S.E.2d 678 (1991); *In re Dostert*, 174 W.Va. 258, 324 S.E.2d 402 (1984); *State ex rel. Hamstead v. Dostert*, 173 W.Va. 133, 313 S.E.2d 409 (1984); *State ex rel. Joseph v. Dostert*, No. 15988 (W. Va. 1983) (slip op.); *State ex rel. Green v. Dostert*, 172 W.Va. 222, 304 S.E.2d 675 (1983); *Wachter v. Dostert*, 172 W.Va. 93, 303 S.E.2d 731 (1983); *State ex rel. Weaver v. Dostert*, 171 W.Va. 461, 300 S.E.2d 102 (1983); *Carey v. Dostert*, 170 W.Va. 334, 294 S.E.2d 137 (1982); *State ex rel. Askin v. Dostert*, 170 W.Va. 562, 295 S.E.2d 271 (1982); *State ex rel. Ward v. Dostert*, No. 15517 (W. Va. 1982) (slip op.); *State ex rel. Skinner v. Dostert*, 166 W.Va. 743, 278 S.E.2d 624 (1981); *State ex rel. D.D.H. v. Dostert*, 165 W.Va. 448, 269 S.E.2d 401 (1980); *West Virginia Judic. Inquiry Comm'n v. Dostert*, 165 W.Va 233, 271 S.E.2d 427 (1980); *State ex rel. Preissler v. Dostert*, 163 W.Va. 719, 260 S.E.2d 279 (1979); *State ex rel. Shamblin v. Dostert*, 163 W.Va. 361, 255 S.E.2d 911 (1979); *State ex rel. Hutzler v. Dostert*, 160 W.Va. 412, 236 S.E.2d 336 (1977); *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977). He also has previously brought two federal lawsuits against the Supreme Court of Appeals or its justices. *See Dostert v. Harshbarger*, 1991 U.S. App. Lexis 5290, *2 (4th Cir. 1991) (noting "long history of Dostert's claims against various justices of the Supreme Court of Appeals of West Virginia"); *Dostert v. Harshbarger*, 911 F.2d 721 (4th Cir. 1990) (table case); *Dostert v. Neely*, 722 F.2d 737 (4th Cir. 1983) (table case); *Dostert v. Neely*, 537 F.Supp. 912 (S.D.W.Va. 1982); *Dostert v. Neely*, 498 F. Supp. 1144 (S.D.W.Va. 1980).

Dostert was also involved as a defendant in a prosecution initiated against him by the Supreme Court of Appeals for criminal contempt of that court. *See State ex rel. Walker v. Giardina*, 170 W.Va. 483, 492, 294 S.E.

2d 900, 909-10 (1982) (ordering prosecution of Dostert for criminal contempt); *West Virginia Judic. Inquiry Comm'n*, 271 S.E.2d at 434 (censure of Dostert affirmed). Dostert was convicted of contempt.[1] *See In re Dostert*, 324 S.E.2d at 406-07 & n.3. Many other actions involved applications by prosecutors or attorneys for writs against Dostert, almost all of which were granted by the West Virginia Supreme Court of Appeals. *See, e.g., Green*, 304 S.E.2d at 678; *Wachter*, 303 S.E.2d at 732; *Weaver*, 300 S.E.2d at 104; *Askin*, 295 S.E.2d at 278; *Carey*, 294 S.E.2d at 140; *Skinner*, 278 S.E.2d at 636; *D.D.H.*, 269 S.E.2d at 416; *Preissler*, 260 S.E.2d at 287; *Hamstead*, 313 S.E.2d at 419; *Shamblin*, 255 S.E.2d. at 914; *Hutzler*, 236 S.E. 2d at 339.

Dostert was not reelected to the bench in 1984, and filed a claim for workers' compensation benefits in July of that year. App. at 9a, 37a. His physician found that he suffered from vaso-spastic artery disease and cardiac arrhythmia as a result of his work as a circuit court judge, and Dostert based his claim on that diagnosis. App. at 9a, 37a-38a. The West Virginia Workers' Compensation Commissioner twice rejected his claim, in 1984 and 1985, App. at 37a, and the West Virginia Workers' Compensation Appeal Board affirmed. App. at 37a.

The Supreme Court of Appeals of West Virginia reversed, holding that Dostert's claim was compensable, and remanded it to the Workers' Compensation Commissioner for determination of the extent of his disability. App. at 37a-39a. An order of the Commissioner next directed that benefits be awarded for the disability, "if any," demonstrated "by sufficient medical evidence to be directly attributable to the compensable condition" of Dostert and required a referral to a physician for a disability evalua-

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[1] Dostert was found guilty of contempt for allegedly having ignored an oral order of the Supreme Court of Appeals, communicated to the county sheriff, not to extradite to Florida two criminal suspects who were later convicted of the charges for which they were extradited.

tion. App. at 36a. The Supreme Court of Appeals had in 1986 denied a separate claim by Dostert for judicial disability, but distinguished the 1988 holding of compensability for workers' compensation purposes from the earlier denial of disability for retirement purposes. App. at 39a.[2]

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[2] Dostert's separate disability claim arose under the West Virginia public employees retirement system, in which he enrolled when he became a judge in 1977. *See In re Dostert*, 174 W.Va. 258, 266, 324 S.E.2d 402, 409 (1984), *overruled by Harshbarger v. Gainer*, 184 W. Va. 656, 403 S.E.2d 399 (1991); *see also* W. Va. Code § 51-9-1b (disapproving *In re Dostert*). The West Virginia Code provided for disability retirement under the public employees system. W. Va. Code § 5-10-25(a)-(b) (1979 Replacement Vol.) (cited in *In re Dostert*, 324 S.E.2d at 423). The Supreme Court of Appeals ordered its own administrative director to intervene as a party in interest (though Dostert did not participate in the judicial retirement system), characterized Dostert's public employee disability claim as one for workers' compensation and routed it to the court's appointed Judicial Hearing Board, instead of the decision-making body for the public employees retirement system. *See In re Dostert*, 324 S.E.2d at 407-08, 424; *see also Harshbarger v. Gainer*, 403 S.E.2d at 400-01 & n.7. The court found the public employee retirement statute to require receipt of workmen's compensation as a condition of disability for those who, like Dostert, had served for less than ten years. The court declared, however, that the West Virginia constitution required that the Supreme Court of Appeals, not the retirement system or workers' compensation tribunal, determine disability of judges, allegedly justifying the remand to the Judicial Hearing Board. *Id.*, 324 S.E.2d at 423-24 (citing W. Va. Const. Art. 8, § 8). The Judicial Hearing Board voted 4-1 in Dostert's favor, but the Supreme Court of Appeals then appealed the decision to itself and reversed it in the unreported 1986 decision, improperly referring the matter to the Workers' Compensation Division instead of the Public Employees Retirement Board. That claim was effectively consolidated, without Dostert's request or consent, with the claim at issue here. This byzantine tale was referred to, albeit in an oblique manner, in the Supreme Court of Appeals' 1988 decision holding Dostert's claim compensable, *see* App. at 39a, a decision rendered 38 days after Dostert had sued that court in federal district court for a violation of 42 U.S.C. § 1983 for attempting to delay or squelch his disability application. *See also Harshbarger v. Gainer*, 403 S.E.2d at 400 (*In re Dostert* "is unique among all reported opinions in this jurisdiction in terms of a truly exotic procedural history").

The Workers' Compensation Division, through the Commissioner, eventually found on the basis of a report by a physician it engaged that no permanent disability existed and in 1989 declined to pay any disability benefits to Dostert. App. at 33a. The West Virginia Workers' Compensation Office of Judges affirmed the denial of benefits in two decisions rendered in 1995 and 1996. App. at 8a, 26a. The West Virginia Workers' Compensation Appeal Board affirmed the denial in an opinion and order in August, 1996, App. at 6a, which was corrected by opinion and order of October 10, 1996. App. at 4a.

Dostert moved by motion mailed on November 9 and filed on November 14, 1996, App. at 3a, 63a, for an extension of time to apply for an appeal, as permitted by the rules of the state court. W. Va. R. App. P. 16(b), App. at 47a. The motion did not include the petition for appeal. *See* App. at 3a. The West Virginia Supreme Court of Appeals granted the motion and extended the time for him to petition for appeal to December 10, 1996. *Id.*

Dostert presented his petition for appeal to the Supreme Court of Appeals on December 31, 1996, with (1) a "Motion for Leave to File Petition for Appeal, Time Having Expired," and (2) a "Motion for Disqualification of all Present[,] Retired and Past Justices of the Supreme Court of Appeals of West Virginia and for Appointment of Three or Five Retired Circuit Judges to Sit and Hear the Above-Styled Proceeding." App. at 1a-2a, 50a-58a.

The motion for disqualification requested the recusal of all sitting, retired and past justices of the Supreme Court of Appeals on the basis that "they are or have been members and officers" of that court during the pendency of Dostert's claim; that Dostert had made a "direct attack" on the "integrity and dignity" of the court in his petition for appeal; that the petition for appeal included "*un-rebutted* allegations under oath accusing the Supreme

Court of Appeals . . . , by and through its justices, agents . . . of committing high crimes and misdemeanors consisting of bribey, conspiracy and misuse of public moneys," and that the Supreme Court of Appeals had hired counsel to oppose Dostert's claim despite having found it compensable, among other points. App. at 51a (emphasis in original).

The motion for leave to file the petition for appeal out of time stated that Dostert had been unable to complete the petition before December 10, 1996, because of "circumstances beyond his control," principally "the lack of adequate stenographic and typographical assistance. . . ." App. at 57a. Dostert filed pro se, his prior counsel having abandoned him. App. at 50a.

The Supreme Court of Appeals, after an opposition was filed by its counsel on January 7, 1997, App. at 1a, denied both of Dostert's motions the next day without any discussion of the legal grounds on which the order was based. App. at 1a-2a. One of the five justices of the Supreme Court of Appeals, Justice McHugh, recused himself. *Id.* Another justice who had been accused by Dostert of bias, Justice Starcher, did not disqualify himself. *See id.* Justice Starcher is reported as having said in public, "Dostert will get judicial retirement over my dead body." App. at 62a. Starcher has also presided over a past prosecution of Dostert and been involved in a romantic relationship with a state's witness against Dostert, both of which were noted in exhibits submitted to the Supreme Court of Appeals on December 31, 1996 with the proposed petition for appeal and motion for disqualification. *See* App. at 62a.

Dostert filed a motion for reconsideration on March 12, 1997. App. at 40a, 59a. Dostert's motion for reconsideration amplified his arguments for disqualification and leave to file out of time. App. at 59a-63a. The motion for reconsideration argued that Dostert had a due process right under the Fourteenth Amendment to the Constitu-

tion of the United States to an unbiased, disinterested and impartial tribunal which was violated by the refusal of all justices of the Supreme Court of Appeals, a party to the case, to disqualify themselves. *Id.* The motion also argued that leave should have been granted to file the petition for appeal. App. at 63a-65a. The Supreme Court of Appeals refused the motion for reconsideration without comment on March 20, 1997. App. at 40a. Again, Justice McHugh recused himself but Justice Starcher did not. *Id.*

B. How the Federal Question Was Presented

Dostert's motion for disqualification of all present, past and retired justices of the Supreme Court of Appeals of West Virginia expressly argued the maxim that "no man ought to be a judge in his own cause," and cited a West Virginia case in support of that point. App. at 54a (citing *Harshbarger v. Gainer*, 184 W.Va. 656, 403 S.E.2d 399 (1991)). Dostert also cited Canon 3 of the Code of Judicial Conduct, which requires recusal of a judge where he is a party to a proceeding or an officer, director or trustee of a party. App. at 54a. He also cited a provision of the West Virginia Constitution which permits the appointment of a judge of a circuit court or intermediate appellate court to serve in place of any justice who is "temporarily disqualified or unable to serve. . . ." *Id.* (citing W.Va. Const., Art. 8, § 2).

The Supreme Court of Appeals did not address the substantive issues raised by the motion for disqualification in its decision denying the motion. App. at 1a-2a.

Though the West Virginia court did not address the issue, Dostert's argument that the justices of the Supreme Court of Appeals may not be judge in their court's own cause obviously raised a federal due process contention. In particular, the West Virginia case that Dostert cited in turn relied on a decision of the United States Supreme Court, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), in making that point. *See Harshbarger*, 184

W.Va. at 660 n.23, 403 S.E.2d at 403 n.23 (citing *Aetna Life*, 475 U.S. at 825-26)). In *Aetna Life*, this Court held that the participation of a judge of the Alabama Supreme Court in a case in which he had a pecuniary interest had violated a litigant's federal due process rights. *See* 475 U.S. at 821-27. *Aetna Life* itself relied on the basic Supreme Court jurisprudence on the federal due process right to an unbiased tribunal, and found that the Alabama judge had "acted as 'a judge in his own case.'" *Id.* at 824 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

Dostert's subsequent motion for reconsideration more fully argued the due process point under the Fourteenth Amendment to the U.S. Constitution, noting that due process "requires a neutral and detached judge in the first instance." App. at 60a (quoting *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust Fund*, 508 U.S. 602, 113 S. Ct. 2264, 2277 (1993)). The motion for reconsideration discussed the federal due process issue at length. App. at 59a-63a. The West Virginia Supreme Court of Appeals failed to pass upon the due process claim or even to mention the disqualification point in its decision rejecting reconsideration. App. at 40a.

The absence of any discussion in the judgment appealed from here of either federal due process or of the legal basis for the motion for disqualification, App. at 1a-2a, indicates that the Supreme Court of Appeals of West Virginia evaded the federal issue by invoking a state procedural rule by which the court deemed Dostert's petition for appeal to be untimely. The West Virginia court applied the applicable state procedural rules, App. at 45a-48a, in an inconsistent and incorrect manner, however.

West Virginia law allowed Dostert 30 days from the October 10, 1996 judgment of the Workers' Compensation Appeal Board to petition for appeal to the Supreme Court of Appeals. W. Va. Code § 23-5-15, App. at

45a. Another state statute permits the extension or excuse of the time period for appeal from the state's Workers' Compensation Appeal Board, "[n]otwithstanding the fact that the time periods set forth for . . . appeals . . . from [the board] are jurisdictional," if the request is made "within a period of time equal to the applicable period" for appeal, "accompanied by the . . . appeal petition." *See* W. Va. § 23-5-6, App. at 45a.

Dostert's first motion for an extension of time was not accompanied by his appeal petition, and was apparently granted pursuant to Rule 16(b) of the Supreme Court of Appeals instead of the statutory provision. *See* W. Va. R. App. P. 16(b) (allowing enlargement for good cause shown of time prescribed by rules or by order of court), App. at 47a. Dostert's second motion for an extension was accompanied by his petition for appeal, and fell within 30 days after his initial extension period. App. at 1a, 57a, 63a. Dostert had applied for the second extension within a period of time "equal to the applicable [appeal] period," W. Va. Code § 23-5-6, App. at 47a. By statute, the Supreme Court of Appeals had the ability to extend the time for appeal again, this time under W. Va. Code § 23-5-6, if good cause or excusable neglect had been shown and considering whether Dostert was represented by counsel (he was not). App. at 45a.

The Supreme Court of Appeals' denial of Dostert's motion for leave to file his petition out of time, without any discussion or reasoning, conflicts with its frequent extension of other appeal periods. The court "possesses 'the implied or inherent authority to enlarge the time for appeal fixed by statute [citations omitted],'" on a showing of good cause. *Coonrod v. Clark*, 189 W. Va. 669, 672, 434 S.E.2d 29, 32 (1993) (quoting *First Nat'l Bank of Bluefield v. Clark*, 181 W. Va. 494, 499, 383 S.E.2d 298, 303 (1989), *overruled on other grounds, Coonrod*, 189 W.Va. at 672, 434 S.E.2d at 32). The court has acknowledged that, "[g]enerally, we have been reluctant

to impose jurisdictional obstacles to block the right of appeal." *Lawyer Disciplinary Board v. Cunningham*, 195 W.Va. 27, 33, 464 S.E.2d 181, 186 (1995) (citing *Talkington v. Barnhart*, 164 W.Va. 488, 493, 264 S.E.2d 450, 453 (1980)) and *State ex rel. Johnson v. McKenzie*, 159 W.Va. 795, 226 S.E.2d 721 (1976)); *see also First Natl. Bank*, 181 W.Va. at 499, 383 S.E.2d at 303 ("We have not hesitated, in other contexts, to remove obstacles to appeal that have been viewed as jurisdictional in nature") (allowing late appeal on basis of court rules, including W. Va. R. App. P. 2 and 16, despite statutory time limit).

The court has only decided two cases under the statute (or its predecessor) allowing extensions of time for appeal to or from the Workers' Compensation Appeal Board since that provision was amended in 1986. In one case, the court refused to allow an appeal filed 413 days late, without any motion having been made in the initial 60 days (unlike this case). *See Fucillo v. Workers' Comp. Comm'r*, 180 W.Va. 595, 597, 378 S.E.2d 637, 639 (1988). In the other case, the court permitted a late appeal, despite the "jurisdictional" nature of the appeal period, when notice of the board's decision was not timely received by the claimant. *See Thompson v. Workers' Comp. Comm'r*, 180 W.Va. 720, 724, 379 S.E.2d 770, 774 (1989).

The denial of Dostert's second motion for an extension of time appears to have been inconsistent with the Supreme Court of Appeals' liberality in allowing late appeals and with the very leniency evident in the statute, West Virginia Code § 23-5-6. App. at 45a. The denial perhaps more likely reflects judicial bias against one (Dostert) who has frequently clashed with the West Virginia court.

The circumstances are analogous to those that prompted this Court in *Hathorn v. Lovorn*, 457 U.S. 255, 262-265 (1982), to find jurisdiction over a federal issue addressed

for the first time on application for rehearing. Dostert's motion for disqualification necessarily raised the federal due process issue, and the West Virginia Supreme Court of Appeals avoided it by invoking an inconsistently applied procedural rule.

In addition, Dostert clearly raised his claims in an adequate manner on his motion for reconsideration, though it was untimely filed. *See* App. at 59a-63a; *Hathorn*, 457 U.S. at 265 n.15; *see also Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988). The refusal of the West Virginia Supreme Court of Appeals to enlarge the time for rehearing is inconsistent with its past pronouncements that time periods are "important whenever reliance interests have been created," but that the lack of third party reliance means that "no reason" exists for a lower court to bind itself to strict time period review. *See Longwell v. Hodge*, 171 W.Va. 45, 48, 297 S.E.2d 820, 822 (1982). The court's own rules allow the time for filing a petition for rehearing to be enlarged for good cause. W. Va. R. App. P. 24(a), at App. 47a. Despite this policy, the court ignored Dostert's plea, his lack of an attorney and his impaired health (which it has itself deemed to constitute a compensable injury, App. at 38a-39a) and refused to entertain or address the motion for reconsideration. App. at 40a, 59a. The court's stance confirms that its refusal to hear Dostert's federal claim is based on bias and caprice, and this Court should take jurisdiction to consider his case. *See Hathorn*, 457 U.S. at 265 n.15.

The West Virginia court also handled Dostert's motion for disqualification in a "surprise" manner, apparently deciding his motion for leave to file out of time before reaching the disqualification issue. *See* App. at 1a-2a; *see also PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917) ("surprise" doctrine). The Supreme Court of Appeals' failure immediately to deal with the motion for disqualification violated the court's own rule which re-

quires that a justice "shall" disqualify himself upon proper motion in accordance with Canon 3(E)(1) of the Code of Judicial Conduct. *See* W. Va. R. App. P. 29(b), App. at 48a-49a; *see also State ex rel. Cohen v. Manchin,* 175 W. Va. 525, 336 S.E.2d 171, 175-76 (1984) (dealing first with motion for recusal); *State ex rel. Bagley v. Blankenship,* 161 W. Va. 630, 246 S.E.2d 99, 105-08 (1978) (same). The court's failure to apply its own rules here raised a federal due process issue that Dostert raised in his motion for reconsideration, and supports jurisdiction in this Court.

C. The Decision of the Court Below

The West Virginia Supreme Court of Appeals held that Dostert had attempted to file his petition for appeal too late, and denied leave to file it. App. at 1a. In that order, the court denied Dostert's motion for a further extension of time and also denied his motion for disqualification without any mention or analysis of legal principles related to either denial. App. at 1a-2a. The court also denied Dostert's motion for reconsideration without comment. App. at 40a. The court was a party to the proceeding, but only one justice (of a total of five) recused himself. The justice, Justice McHugh, had been a party to at least one earlier case between members of the court and Dostert. *See Dostert v. Harshbarger,* 1991 U.S. App. Lexis 5290.

REASONS FOR GRANTING THE WRIT

DOSTERT HAS BEEN DEPRIVED OF HIS FEDERAL DUE PROCESS RIGHT TO AN IMPARTIAL TRIBUNAL BY THE REFUSAL OF FOUR OF THE FIVE JUSTICES OF THE WEST VIRGINIA COURT TO DISQUALIFY THEMSELVES

Dostert has a federal due process right under the Fourteenth Amendment to the Constitution to an unbiased, disinterested and impartial tribunal. The Supreme Court of Appeals of West Virginia cannot be impartial in this

matter, being his adversary in this case and having been his opponent in other matters. Dostert's record of having been a losing litigant before that court during his time as a judge also necessarily has biased it against him.

Due process "requires a 'neutral and detached judge in the first instance.' " *Concrete Pipe & Products*, 113 S. Ct. at 2277 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972)). "Not only is a biased decision-maker constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the probability of unfairness.' " *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975).

This court has held that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955).

> No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. *With equal, nay wth greater reason, a body of men are unfit to be both judges and parties at the same time. . . .*

The Federalist No. 10 at 79 (C. Rossiter ed. 1961) (quoted in *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227, 2233 (1995)) (emphasis added).

Judges should disqualify themselves where the circumstances "offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true" between the parties. *See Ward*, 409 U.S. at 60; *see also Aetna Life*, 475 U.S. at 822 (same). This "stringent rule" may sometimes bar participation "by judges who have no actual bias," *In re Murchison*, 349 U.S. at 136, but " 'justice must satisfy the appearance of justice.' " *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

Bias may be shown either by an adjudicator's having prejudged the issues or having a conflicting institutional or

pecuniary interest, among other things. *See, e.g., Ward*, 409 U.S. at 58-62 (mayor disqualified from hearing traffic offenses by virtue of conflict between executive and judicial positions; town derived significant revenue from convictions in such cases); *Taylor v. Hayes*, 418 U.S. 488, 501-02 (1974) (judge who "became embroiled in running controversy with" litigant should not have tried him for contempt); *In re Murchison*, 349 U.S. at 138 (judge who had obtained personal knowledge about defendant's "attitude" during secret pretrial hearing was disqualified as biased and as possible witness); *International Ass'n of Machinists v. Metro-North Commuter R.R.*, 24 F.3d 369, 372 (2d Cir. 1994) (member of union party disqualified from sitting as decisionmaker); *Yamaha Motor Corp. v. Riney*, 21 F.3d 793, 798 (8th Cir. 1994) (ruling of state commission not competent where member of it had prejudged matter and had pecuniary interest in it); *United States v. Werner*, 916 F.2d 175, 176-79 (4th Cir. 1990) (land commissioner disqualified by animosity to claimant's attorney, conflict between duties as commissioner and town mayor, and other actions indicating bias); *Staton v. Mayes*, 552 F.2d 908, 912-16 (10th Cir.), *cert. denied*, 434 U.S. 907 (1977) (prehearing statements by members of decisionmaking board showed prejudice and denied due process to fired employee); *see also Texaco, Inc. v. Federal Trade Comm'n*, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965) (speech by FTC commissioner showed prejudgment) (cited, among other cases, in *Withrow*, 421 U.S. at 50 n.16).

The presence of even one interested or biased decisionmaker on a tribunal may make it incompetent to decide the issues before it. *See Stivers v. Pierce*, 71 F.3d 732, 746-48 (9th Cir. 1995); *Yamaha Motor Corp.*, 21 F.3d at 798; *Antoniu v. Securities and Exchange Comm'n*, 877 F.2d 721, 724-26 (8th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *see also Aetna Life*, 475 U.S. at 831 (Brennan, J., concurring) (same).

Here, only one of the five justices of the West Virginia Supreme Court of Appeals disqualified himself, apparently

because he had been a party to earlier lawsuits between Dostert and the members of the court. App. at 1a-2a. Another justice, Justice Starcher, failed to disqualify himself despite having been accused by Dostert of having stated that "Dostert will get disability retirement over my dead body," which is plain bias, App. at 62a, and having been romantically involved with a State's witness against Dostert in a prosecution over which Starcher presided. Starcher should have disqualified himself, and his participation poisoned the proceedings and requires that they be vacated. *See Antoniu,* 877 F.2d at 726 (nullifying agency decision in which commissioner who had made public, biased statements against litigant had participated and remanding for de novo proceeding without him); *see also Stivers,* 71 F.3d at 74-45 (bias shown by public statements by member of decisionmaker); *Bakalis v. Golembeski,* 35 F.3d 318, 236 (7th Cir. 1994) (public statements by members of decisionmaker showed bias and prejudgment of case).

In addition, the court has intruded itself into the matter as the purported employer of Dostert, an elected official, for purposes of the workers' compensation claim, App. at 8a, 26a, without any legal basis and has actively opposed it ever since the court (ironically) held the claim to be compensable in 1988. App. at 1a, 4a, 6a, 26a, 33a, 40a. The court's past decisions on the matter also demonstrate bias against Dostert, such as the discussion in the 1988 decision (purporting to be the views of only one justice, Justice Neely) which distinguished that ruling from the 1986 denial of disability and pointedly stated that the court "makes a finding solely on the issue of compensability, not the extent of that disability." App. at 39a. Though the portion of the decision attributed to then Justice Neely (who has since retired) opined that the "liberality rule" in workers' compensation cases separated this matter from Dostert's disability claim, App. at 39a, the subsequent actions of the Supreme Court of Appeals in opposing Dostert's claim attest to its predis-

position against him. *See App.* at 1a, 4a, 6a, 8a, 26a, 33a, 40a.

The West Virginia Supreme Court of Appeals cannot fairly act as the decisionmaker in this case to which it is a party. It is both institutionally biased and has shown hostility to Dostert's claim, indicating that it has prejudged the matter. The court is "not 'capable of judging [this] controversy fairly on the basis of its own circumstances.'" *See Hortonville Jt. School Dist. No. 1 v. Hortonville Educ. Ass'n,* 426 U.S. 482, 493 (1976) (quoting *United States v. Morgan,* 313 U.S. 409, 421 (1941)); *see also Gibson v. Berryhill,* 411 U.S. 564, 578-579 (1973) (indicating approval of view that prejudgment of case may disqualify decisionmaker).

It certainly appears that the West Virginia court is involved in a situation here that "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *See Aetna Life,* 475 U.S. at 822 (quoting *Ward,* 409 U.S. at 60). Indeed, the Supreme Court of Appeals has been embroiled in controversy with Dostert for many years and cannot be objective when he is a litigant. *Cf. Taylor,* 418 U.S. at 501-02 (involvement in contempt proceedings of judge who had been "embroiled in a running controversy" with defendant during trial violated due process); *see also Mayberry v. Pennsylvania,* 400 U.S. 455, 465 (1971) (judge involved in "running, bitter controversy" could not "maintain that calm detachment necessary for fair adjudication").

Nor does any necessity exist for the court's membership to sit in judgment of Dostert's claim. Instead, the West Virginia Constitution authorizes the appointment of substitute justices from among the ranks of circuit court judges in the state. W. Va. Const. Art. 8, § 2, App. at 43a; *see also* W. Va. Const. Art. 8, § 8, App. at 43a-44a. Dostert's motion for disqualification asked for the appoint-

ment of five substitute judges from a roster of ten retired judges. App. at 56a. By that procedure, judges unaffiliated with the institutional interests of the Supreme Court of Appeals could hear and decide Dostert's case, as that court has done in other cases in which its objectivity could reasonably be questioned. *See, e.g., Harshbarger v. Gainer,* 184 W. Va. at 662, 643 S.E.2d at 405 (three of five justices recused themselves and two circuit judges and one retired justice took their places).

The Court should take jurisdiction of this case and hear it on the merits to insure that state tribunals whose membership appears to be biased against a litigant not decide such cases without appropriate measures to eliminate prejudice to that party. Otherwise, the basic Fourteenth Amendment right of due process is in grave danger of being obliterated by courts predisposed to reject the claims of those in Dostert's position.

CONCLUSION

For the reasons set forth, the petition for certiorari should be granted.

Respectfully submitted,

PIERRE E. DOSTERT
Petitioner, Pro Se
Route 5, Box 120
Harpers Ferry, WV 25425
(304) 535-2593

APPENDIX

APPENDIX

APPENDIX

STATE OF WEST VIRGINIA
IN THE SUPREME COURT OF APPEALS
IN VACATION

PIERRE E. DOSTERT,

Petitioner

vs.

WORKERS' COMPENSATION DIVISION and
the SUPREME COURT OF APPEALS
OF WEST VIRGINIA,

Respondent

On a former day, to-wit, December 31, 1996, came the petitioner, Pierre E. Dostert, pro se, and presented to the Court his motion in writing for a further extension of time within which to apply for an appeal to this Court from the final decision of the Workers' Compensation Appeal Board entered on the 10th day of October, 1996, in the above-captioned proceeding, and his motion in writing requesting that all present and past justices of the Supreme Court of Appeals of West Virginia be disqualified from participating in consideration or decision of the above-captioned proceeding. Thereafter, on the 7th day of January, 1997, came the respondent, the Supreme Court of Appeals of West Virginia, by Steptoe & Johnson, and Douglas G. Lee, its attorneys, and presented to the Court its written response in opposition to the motion for an additional extension of time within which to file a petition for appeal.

Upon consideration whereof, the Court is of opinion to and doth hereby deny said motions for a further extension of time within which to file a petition for appeal, and for

disqualification of all present and past justices from involvement therein. Justice McHugh deemed himself disqualified and did not participate in the consideration or decision of this matter.

DONE IN VACATION of the Supreme Court of Appeals, this 8th day of January, 1997.

HONORABLE MARGARET L. WORKMAN
Chief Justice

HONORABLE ROBIN JEAN DAVIS

HONORABLE LARRY V. STARCHER

HONORABLE ELLIOTT E. MAYNARD

Received the foregoing order this 8th day of January, 1997, and entered the same in Order Book No. 122.

A True Copy Attest:

/s/ Connie A. Bowling
Interim Clerk
Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd day of November, 1996, the following order was made and entered:

PIERRE E. DOSTERT,
Petitioner

vs.

WORKERS' COMPENSATION DIVISION and
WV SUPREME COURT OF APPEALS,
Respondent

On a former day, to-wit, November 14, 1996, came the petitioner, Pierre E. Dostert, pro se, and presented to the Court his motion in writing for an extension of time within which to apply for an appeal to this Court from the final decision of the Workers' Compensation Appeal Board entered on the 10th day of October, 1996, in the above-captioned proceeding.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said motion. It is therefore considered and ordered that the time within which to file an application for an appeal herein be, and the same hereby is, extended until the 10th day of December, 1996; all of which is ordered to be certified to the Workers' Compensation Appeal Board and to the Workers' Compensation Commissioner. Chief Justice McHugh deemed himself disqualified and did not participate in the consideration or decision of this matter.

A True Copy Attest:

/s/ Connie A. Bowling
Interim Clerk
Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Session of the Workers' Compensation Appeal Board continued and held at One Players Club Drive in the City of Charleston, the 8th day of August, 1996.

Present: The Honorable Richard Thompson, Chairman, R. Joseph Zak and Barbara Barruss Hatfield, Members.

In the case of

PIERRE E. DOSTERT,
Appellant,

v.

WORKERS' COMPENSATION DIVISION and
WV SUPREME COURT OF APPEALS,
Appellees.

Appeal No. 37487
Claim No. 84-63536
SSN 579-40-0570
DOI 6-11-84

(Correcting Order Dated
August 30, 1996)

---

the following Corrected Memorandum of Opinion and Order were made and entered:

This is an appeal by the claimant from *the* final *orders* of the Workers' Compensation Office of Judges dated November 13, 1995, which affirmed a prior ruling of

July 3, 1989, granting no permanent partial disability, *and February 13, 1966 which modified the prior ruling of November 13, 1965, insofar as it did not consider the issue of permanent total disability, and further denied a permanent total disability award.* The claimant asserts on appeal that he is entitled to a permanent total disability award.

After review and consideration of all of the evidence of record, and in light of the rule of liberality, it is the opinion of this Board that the aforesaid final order of the Office of Judges should be affirmed.

Accordingly, it is ordered that the final *orders* of the Workers' Compensation Office of Judges dated November 13, 1995, *and February 13, 1996 are* hereby affirmed. This shall be certified to the Division.

From any decision of the Board, including any order of remand, an application for review may be prosecuted by either party, or by the Division, to the Supreme Court of Appeals within thirty days from the date of certification of this order.

/s/ Richard Thompson
RICHARD THOMPSON
Chairman

The foregoing order is accordingly hereby certified to the Division this 10th day of October, 1996.

/s/ Judy F. Hudson
JUDY F. HUDSON
Secretary

STATE OF WEST VIRGINIA

At a Regular Session of the Workers' Compensation Appeal Board continued and held at One Players Club Drive in the City of Charleston, the 8th day of August, 1996.

Present: The Honorable Richard Thompson, Chairman, Barbara Burruss Hatfield, and R. Joseph Zak Members.

In the case of

PIERRE E. DOSTERT,
Appellant,

v.

WORKERS' COMPENSATION DIVISION and
WV SUPREME COURT OF APPEALS,
Appellees.

Appeal No.	37487
Claim No.	84-63536
SSN	579-40-0570
DOI	6-11-84

---

the following Memorandum of Opinion and Order were made and entered:

This is an appeal by the claimant from a final order of the Workers' Compensation Office of Judges dated November 13, 1995, which affirmed a prior ruling of July 3, 1989, granting no permanent partial disability.

The claimant asserts on appeal that he is entitled to a permanent total disability award.

After review and consideration of all of the evidence of record, and in light of the rule of liberality, it is the opinion of this Board that the aforesaid final order of the Office of Judges should be affirmed.

Accordingly, it is ordered that the final order of the Workers' Compensation Office of Judges dated November 13, 1995, is hereby affirmed. This shall be certified to the Division.

From any decision of the Board, including any order of remand, an application for review may be prosecuted by either party, or by the Division, to the Supreme Court of Appeals within thirty days from the date of certification of this order.

/s/ Richard Thompson
RICHARD THOMPSON
Chairman

The foregoing Order is accordingly hereby certified to the Division this 30th day of August, 1996.

/s/ Judy F. Hudson
JUDY F. HUDSON
Secretary

STATE OF WEST VIRGINIA
WORKERS' COMPENSATION OFFICE OF JUDGES

Claim No. 84-63536
S. S. No. 579-40-0570
D. O. I. 06/11/84

CORRECTED DECISION

IN THE MATTER OF:

PIERRE E. DOSTERT,
Claimant

and

WORKERS' COMPENSATION DIVISION

and

WEST VIRGINIA SUPREME COURT OF APPEALS,
Employer

DECISION OF THE ADMINISTRATIVE LAW JUDGE

APPEARANCES:

Claimant, pro se.
Employer by Counsel, Douglas Lee.

ISSUES:

The claimant moved to reconsider the Order of the Office of Judges entered November 13, 1995, as it did not deal with the issue of permanent total disability.

DECISION:

It is ORDERED that the claimant's motion be granted, and that the Order of November 13, 1995, be MODIFIED insofar as it did not consider the issue of permanent total disability. In all other aspects, particularly the finding that the claimant had not suffered any permanent partial disability, that Order is AFFIRMED. It is further ORDERED that permanent total disability be DENIED.

FINDINGS OF FACT:

1. The claimant was born on November 14, 1933. He graduated from high school in 1951 in the Washington, D.C., area. He received his Bachelor's Degree from American University in Washington, D.C., in 1957. He received his JD Degree from Georgetown University School of Law in 1959. The claimant was self-employed as an attorney from 1959 to 1977. In 1977, he became a circuit judge in Jefferson County, West Virginia.

2. The claimant became involved in several legal battles with his employer, the West Virginia Supreme Court of Appeals. He was the subject of both criminal charges and disciplinary actions. The claimant was called to Charleston, West Virginia, to attend hearings on these matters. When this occurred, he was hospitalized for unspecified coronary problems.

3. The claimant lost his bid for re-election as circuit judge in the June 5, 1984, primary election. The claimant alleged he began suffering vaso-spastic coronary artery disease in June, 1984. He filed this claim on June 13, 1984. The claim was originally rejected by the Commissioner's Order of August 27, 1984. This was affirmed through litigation. The rejection was affirmed by the Workers' Compensation Appeal Board by the Order of October 31, 1986. By an Order entered June 2, 1988, the West Virginia Supreme Court of Appeals reversed the rejection and held the claim compensable. The decision

stated that it covered only the issue of compensability and made no ruling regarding the degree of disability, if any.

4. Pursuant to the Supreme Court's Order, the Workers' Compensation Fund paid the claimant temporary total disability benefits from June 12, 1984, to September 9, 1984. No temporary total disability has been paid for any period since then, nor has the claimant requested any. The claimant has not requested any treatment be paid for since 1984 despite allegations that he was treated for his heart condition up to August, 1991.

5. The claimant, by his own account, worked in a publishing operation out of his home of which he was part owner since 1984. He has done no other renumerative work. He admits to making $3,000 to $5,000 per year in royalties. In spite of this low income, he was able to maintain an active lifestyle and was able to pay up to $2,700 a year in medical insurance premiums. He stated he works up to 4 hours a day writing updates of books he has previously written for 3 to 4 months of the year. He admitted to Robert C. Ovington, M.D., that he made approximately $28,000 in 1992, a great deal of which he withdrew from business proceeds to pay for medical bills which were unrelated to his compensable condition.

6. The claimant was certified as an EMT in 1987. In 1989 through 1990, he took a paramedic course and worked as a paramedic and worked at a local hospital until 1991. According to statements he made to Dr. Ovington, he was on call 24 hours a day. This was apparently volunteer work. The claimant told Dr. Ovington he did not find this sort of work stressful.

7. The claimant's application was signed by Harry Scott, M.D., an internal medicine specialist. Dr. Scott stated that the claimant suffered from vaso-spastic coronary artery disease which he diagnosed as Prinzmetal's Angina (unstable angina). Dr. Scott went on to say that "Return to work would present a danger of serious and/or lethal consequences in spite of continued treatment."

8. The record shows a discharge summary from Jefferson Memorial Hospital in Martinsburg, West Virginia, dated May 20, 1983. Robert F. Webb, M.D., stated that the claimant had recurrent episodes of prolonged and chest pain of unknown cause.

9. On October 9, 1984, letter of James M. Bacos, M.D., cardiologist, stated that the claimant had a history of hypertension, diabetes, and coronary artery disease of the sclerotic type. However, coronary arteriography failed to disclose any evidence of atherosclerotic change. While this did not exclude the possibility of spastic coronary disease, he could see no evidence of any such spasms.

10. On October 4, 1983, records from Halifax Hospital Medical Center in Daytona Beach, Florida, showed that the claimant was hospitalized for chest pain. This was diagnosed as alcohol induced gastritis and gastroesophageal reflux from ethanol (alcohol) abuse. The claimant was also found to have abnormal liver function tests "probably due to alcohol" and a history of alcohol use with vomiting and chest pain. The claimant's blood alcohol level was quite elevated upon admission.

11. By the claimant's admision, he stopped seeing Dr. Scott in 1986 or 1987. In spite of this, Dr. Scott filled out a WC-219 form (Attending Physician's Report) dated September 17, 1988. Dr. Scott stated that the claimant's spastic coronary seizures would recur if the claimant practiced law or served as a judge. His maximum ability to work was 4 hours a day. He stated that a courtroom appearance on the claimant's own behalf as a witness produced adverse symptoms according to the patient.

12. A January 24, 1989, report of Jesse B. Jalazo, M.D., stated that the claimant was given an exercise stress test on December 7, 1988. There was no evidence of ischemia and no chest pain during the test.

13. The claimant was referred by the Division to Thomas B. Haywood, M.D., a cardiologist. In a series

of reports dated May 30, 1989 and June 23, 1989, Dr. Haywood stated that the claimant alleged a history of previous myocardial infarctions which he said occurred in the 1970's. Dr. Haywood found this to be highly unlikely. Catheterization and coronary arteriography at the Washington Hospital Center in June, 1981 showed no regional wall motion abnormalities. A recent electrocardiogram showed no focal wall motion abnormalities. Therefore, Dr. Haywood found it unlikely that a myocardial infarction occurred since the 1981 catheterization. There was no evidence of any previous myocardial infarction. There was no evidence to confirm the claimant's allegations of paroxysmal supraventricular tachycardia. Dr. Haywood stated that even if this was the claimant's condition, this was really a disabling dysrhythmia and it was usually well controlled with medication. He found no evidence of coronary artery spasm. The claimant's alleged 12 year history of non-exertional chest pain was very atypical for angina pectoris on the basis of obstruction coronary artery disease. Dr. Haywood found the claimant quite capable of dealing with legal matters at various levels and found that he was not totally disabled. He stated that "At this point, it becomes increasingly subjective as to how much one is disabled insofar as it is extremely difficult, at times impossible, to translate results of an exercise treadmill study into a percentage disability. It remains by belief that the patient's disability, if any, arises out of a suspected fixed obstructive coronary artery disease which is certainly a largely non-occupational disease entity." He stated based upon the claimant's overall condition, this amounted to a 10% to 25% impairment. He did not attribute this to the claimant's employment. Based upon this report, the Division entered the Order of July 3, 1989, granting no permanent partial disability as a result of the claimant's occupational disease.

14. In a letter of July 26, 1989, claimant's counsel requested that the decision be reconsidered and that the claimant be found to be permanently and totally disabled.

This put the issue of permanent total disability before the Division although it was not acted upon.

15. Records shows a brief written pro se by the claimant in his case dealing with the Supreme Court. This was filed January 12, 1988. It consisted of 6 pages, citing authority and making argument.

16. A December 13, 1988, letter of James M. Bacos, M.D., cardiologist, to James H. Walker, M.D., a cardiovascular and thoracic surgeon, stated that at the time of his examination of the claimant "there was absolutely no proof of (a superimposed spasm as a cause for chest discomfort), and if you were to press me, I would have to say that, in the absence of any arteriosclerotic changes at the time of catheterization, we would have to say that Judge Dostert's symptoms were not related to his cardiac status. It would therefore follow that there is no relationship between his cardiac status and his professional position at that time."

17. Claimant's counsel introduced the November 30, 1989, report of Bradley Soule, M.D., a psychiatrist. Dr. Soule did not give any psychological battery of tests. He relied on the claimant's statement that Dr. Scott had said to him that he would have to quit being a judge or he would not live long. The claimant said that he found his work satisfying and was not intrinsically difficult. The claimant stated that he had conflicted with the Supreme Court repeatedly since 1979. He alleged false accusations regarding a helicopter incident which was allegedly misrepresented in the press causing him stress. The claimant stated his chest pain occurred at night and was usually relieved by nitroglycerin. He allegedly became asymptomatic when he stopped having involvement with legal matters. The claimant did not mention that he had filed suit against the state Supreme Court in Federal District Court and that this matter was ongoing at the time. Therefore, he had not really ceased having involvement with legal matters. Dr. Soule was not aware of this. Dr.

Soule concluded the claimant was occupationally disabled due to psychological factors and stress leading to Prinzmetal's Angina and that he had been permanently and totally disabled since 1984. He was aware of the claimant's publishing operation but felt that this was a hobby, not a true vocational pursuit. Dr. Soule's report is found to be unreliable.

18. Claimant's counsel introduced an August 20, 1991, psychovocational evaluation by Harold D. Slaughter, Jr., M.S., a psychologist. Mr. Slaughter felt the claimant had major restrictions present due to physical and emotional factors. The claimant stated that he was an EMT but could no longer do this work due to becoming easily fatigued. This is in contrast to the statement he later gave to Dr. Ovington. He stated he could not do gardening or even ride a lawn tractor. He could not stay in the sun, climb stairs, and had to give up directing church choirs. Mr. Slaughter was unaware of the claimant's liver problems which necessitated a liver transplant approximately one year later. Mr. Slaughter felt that since the claimant attended college there was no need to administer IQ tests or any other test other than the MMPI. The claimant stated he would not reenter law because everything he did would be questioned by others. Mr. Slaughter recommended psychotherapy "if any type of surgical treatment is warranted." He did not explain why psychotherapy was appropriate only if surgery was undertaken. He made a diagnosis of dysthymia with underlying depression. He felt the claimant was not capable of returning to his field of law as gainful employment and that the claimant was permanently and totally disabled. The report is found to be unreliable.

19. Bradley Soule, M.D., testified at a hearing held in this claim on September 16, 1991. He felt that the claimant was a very public man and he had been dragged through the press in a negative way which had a lasting impact on his condition. He stated the claimant was not

"some sort of a hopelessly neurotic individual . . . in many ways, he is as emotionally robust as we all are . . . [U]nfortunately, his coronary arteries don't think so." He felt that the claimant suffered from Prinzmetal's Angina, mostly based upon the claimant's subjective statements to him. He felt that the claimant's humiliation from his repeated run-ins with the West Virginia Supreme Court of Appeals had caused permanent damage. He admitted the claimant was not suffering from somatoform disorder stating "Somatoform disorder, of course, is simply a polite term for being a 'crock', a hypochondriac, and there isn't anything about the judge that would suggest this." He went on to state that Judge Dostert was not incapacitated in any conventional sense stating he had no psychosis of any kind nor any neuroses. He admitted he did not know how much money the claimant earned from his publishing business. Dr. Soule's testimony is found to be unreliable.

20. At the same hearing, Harold Slaughter, Jr., M.S., testified. He stated he had reviewed various medical reports although it was quite obvious he had not reviewed reports of many of the claimant's hospitalizations. He stated that the claimant could not do menial jobs as he considered them demeaning and this would exacerbate his symptoms. This testimony is found to be unreliable.

21. At this hearing, claimant's counsel introduced a pro se affidavit of the claimant dated September 5, 1991. This was a long rambling paranoid statement indicating that Justices Richard Neely and Fred Caplan were out to get him, that they had planted stories in the Charleston Gazette about him and bribed his secretary to testify against him and otherwise report on him clandestinely. The affidavit is found to be without evidentiary weight as it does not detail any degree of disability, permanent or otherwise, suffered by the claimant.

22. The claimant testified at a hearing held in this claim on March 12, 1992. At that time, he stated "I will not practice law because of my feeling that it would in-

evitably lead to further hospitalizations with potentially lethal consequences as stated by my physicians." He alleged repeated hospitaliaztions for coronary care since 1985, but introduced no medical records to substantiate this. When asked by the employer's counsel if he would know how to search a title, thereby being able to practice some sort of law, he stated "I wouldn't know where to begin."

The claimant stated that it would be stressful for him to try to learn another field of law at this time stating "I would not risk an accusation of incompentency by trying to do such a thing." He felt he was incompetent to do anything other than trial work. He could not learn new fields of law due to "the extreme anxiety that I would be accused of being incompetent."

23. In June, 1992, the claimant underwent a liver transplant. This is unrelated to his compensable condition.

24. The employer introduced the August 11, 1993, report of Robert C. Ovington, M.D., a psychiatrist. The claimant told Dr. Ovington that his claim has always been for permanent total disability. He alleged his coronary artery disease occurred from an extremely heavy case load while working as a judge; legal action taken against him while he was a judge and his having been found guilty both times; failure to win reelection in the June 5, 1984 primary; and the great expenses incurred from defending himself in the actions and his failure to receive a permanent total disability award, either from Workers' Compensation or from a judicial disability pension.

The claimant admitted to suffering from hypertension since the age of 15. The claimant stated that he stopped working on the advice of Harry Scott, M.D. Dr. Ovington noted that Dr. Scott was an internist, not a cardiologist. He stated "Although the claimant attributed his ceasing work to the recommendation of Dr. Scott, it was definitely my impression that he had no desire whatsoever

at that time to return to the workforce." Dr. Ovington felt that it was significant that cardiac catheterization showed no demonstrable significant obstructive coronary artery disease. Dr. Ovington felt it very apparent that Bradley Soule, M.D., did not examine Dr. Haywood's reports.

The claimant stated that in addition to the $3,000 to $5,000 per year he had been making at his publishing business, he had been drawing from his savings which were now almost exhausted. The claimant admitted to having a liver transplant in 1992. He said that his liver was necrotic but did not explain why. When asked if this was due to cirrhosis, he stated he did not know.

The claimant admitted to Dr. Ovington to consuming alcohol in the amount of 4 to 6 ounces per drink 5 to 6 times a week as described by Dr. Haywood in his reports. He had never sought or obtained psychiatric treatment. The claimant stated that he stopped drinking after his liver transplant. The claimant stated he was in a coma following his liver transplant and suffered intellectual impairment but this was not reflected in the results of any psychological tests given. He admitted that since the liver transplant, he had been more depressed.

He had a verbal IQ of 127, performance IQ of 105, and a full scale IQ of 120. He had above 12th grade reading level and a 10th grade math level. Part of this was due to some careless errors he made on the math test. The MMPI test was valid but showed elevated T scores for hysteria, hypochondriasis, and depression. The MMPI did not indicate paranoia.

The claimant admitted to obtaining an EMT certificate in 1987 and completing a paramedic course in 1989 to 1990. He worked as a paramedic until 1991, being on call 24 hours a day. The claimant stated he would not find this sort of work stressful. It was apparently done on a volunteer basis.

The claimant's activities consisted of working 4 hours a day, playing duplicate bridge 1 to 2 times a week, playing piano 3 to 4 hours a day, and practicing on a pipe organ in a local church 3 to 4 times a week. *The claimant stated to Dr. Ovington he had never suffered a myocardial infarction.* He admitted that he had not seen Dr. Scott since 1986 to 1987. He stated he could not return to the practice of law because people would think he was suspect because of the two criminal charges brought against him by the Supreme Court. When Dr. Ovington informed him that searching land titles was certainly not a stressful job, the claimant "rather unconvincingly," said he would have no idea how to go about this. Dr. Ovington stated "It was my impression that he thought this would be quite menial and demeaning." Dr. Ovington found no psychological diagnosis was warranted. Cardiology reports made it highly unlikely he had any Prinzmetal's diseases. There was no psychiatric reason to prevent him from practicing law or any other profession. The claimant's primary problem appeared to be due to his liver transplant. Dr. Ovington did not feel the claimant was suffering from dysthymia from any cause. There was no evidence of any psychiatric disability. He stated that since the claimant has "by his own admission, spent 9 years pursuing a permanent disability award from the Workers' Compensation Fund, I do not find it difficult to understand why he is reluctant to give up this quest." The report of Dr. Ovington is found to be reliable.

25. The claimant introduced the August 25, 1994, report of Alex Ambroz, M.D. Dr. Ambroz may be a specialist in internal medicine, but this is uncertain from the curriculum vitae introduced with the report. Dr. Ambroz reviewed only the favorable reports of the claimant and did not review the report of Dr. Haywood, Dr. Bacos, Dr. Basu, or other hospital admissions. He stated that apparently the claimant had several heart attacks. The liver transplant was made for cirrhosis of the liver.

Instead of unstable angina, he diagnosed congestive heart failure. Dr. Ambroz' report is found to be unreliable.

26. By an Order entered November 13, 1995, the Office of Judges affirmed the July 3, 1989, Order granting no award for permanent partial disability. This Order found that permanent total disability was not an issue in litigation. Aside from this, the report is found to be valid, and its Findings of Fact are adopted as a law of the case in this Order.

27. The claimant appealed the decision of July 3, 1989, writing his own pro se appeal brief. This was done by letter and document dated December 11, 1995.

28. On December 13, 1995, the claimant moved for reconsideration of the November 13, 1995, Order arguing again pro se in a 6-page memoranda of law supporting the motion.

DISCUSSION:

JURISDICTION

Normally, a motion for reconsideration of a final Order cannot be granted. An adjudication done by the Commissioner, and by reasonable inference the Office of Judges, of an issue in litigation becomes final upon the entry of that Order. W.Va. Code § 23-5-1; *Dismond v. State Workers' Compensation Commissioner,* 132 S.E.2d 743 (W. Va. 1963). The fact that the 30-day period for appeal may or may not have expired at the time the motion was made is completely *immaterial.* Normally, the grieved party's only recourse is to appeal the matter to the Workers' Compensation Appeal Board.

There are exceptions to this policy. A final Order may be corrected or set aside when it was entered through fraud or mistake. *Collins v. State Compensation Commissioner,* 117 S.E.2d 313 (W.Va. 1960); *Stewart v. State Compensation Director,* 144 S.E.2d 327 (W.Va.

1965). Fraud is obviously not an issue here. Therefore, one must determine where it is a mistake. In *Stewart*, the Court gave an example of what they considered to be a mistake:

> For example, if three doctors stated that the claimant had a 30% permanent partial disability and a clerk in the office of the department had misread the 30% and made a notation of 80% instead, and such an award was made, the Court is of the view that the Commissioner would have the authority, after a period of protest or appeal had passed, to rectify such a mistake. *Stewart* at 330.

The Court later found other instances in which a final Order could be set aside. *Munday v. State Workers' Compensation Commissioner,* 177 S.E.2d 221 (W.Va. 1970) expanded slightly the doctrine of clerical error. *Hubbard v. State Workers' Compensation Commissioner,* 295 S.E.2d 695 (W.Va. 1982) found that the mistaken application of the wrong procedural statute was grounds for overturning a final Order.

In this case, the Administrative Law Judge who wrote the Decision of November 13, 1995, mistakenly felt that permanent total disability was not an issue in litigation. It is clear that this was an issue for quite some time, despite the fact that the Workers' Compensation Commissioner failed to ever act upon it. It is found that this is the sort of clerical error envisioned by the Court in the *Stewart* case. Therefore, the claimant's motion for reconsideration is proper and should be granted.

PERMANENT TOTAL DISABILITY

The Division is granted the authority to determine permanent partial disability in Workers' Compensation claims. W.Va. Code § 23-4-6. No provision of Workers' Compensation Law gives a physician, even if he is an

official examiner for the Division, the power or authority to fix the degree of disability in any case. That is the responsibility and duty of the Commissioner alone. *Sisk v. State Workman's Compensation Commissioner,* 153 W. Va. 461, 170 S.E.2d 20 (1969); *Stewart v. State Workman's Compensation Commissioner,* 155 W.Va. 633, 186 S.E.2d 700 (1972); *McGeary v. State Compensation Director,* 148 W.Va. 436, 135 S.E.2d 345 (1964); *Haines v. Workman's Compensation Commissioner,* 151 W.Va. 152, 150 S.E.2d 883 (1966). The Division must view evidence in the light most favorable to the claimant whenever the evidence is sufficiently in conflict that reasonable men could differ concerning whether the claimant has proven his case. *Persiani v. State Workers' Compensation Commissioner,* 162 W.Va. 230, 248 S.E.2d 844 (1978).

Permanent total disability awards are granted pursuant to W. Va. Code § 23-4-6(n) as interpreted by *Posey v. State Workmen's Compensation Commissioner,* 157 W.Va. 285, 201 S.E.2d 102 (1973) and *Cardwell v. State Workmen's Compensation Commissioner,* 301 S.E.2d 790 (W.Va. 1983). This section of the Code states in pertinent part as follows:

> A disability which renders the injured employee unable to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time shall be considered in determining the issue of total disability.

Posey found that a claimant was permanently and totally disabled when he was unable to perform in any remunerative work in a field for which he is suited by experience or training. The Court later stated that the term "training" envisions one who, as a result of an injury, is unable to perform his former occupation, but

is capable of being retrained, may not be totally disabled. *Hunter v. Workers' Compensation Commissioner,* 386 S.E.2d 500, 503 (W.Va. 1989). *Cardwell* stated that medical evidence must be considered along with the claimant's customary employment, his age, training, education, intelligence, and any other matter that can be reasonably expected to affect earning power and regular employment in the labor market. *Cardwell,* at 794.

The first question we must ask in the determination of whether or not the claimant is permanently and totally disabled is can he return to his former work. There appears to be no reason either physical or psychiatric why he could not. There is a notable lack of objective evidence on the claimant's cardiac condition relating to his occupation. The main reason he cannot return to work being a judge is that he lost the election in June, 1984. Cardiologists cannot find any reason for the claimant's alleged symptoms. Even if he could not be a judge, there is no reason why he could not continue to practice law. In fact, the record is replete with examples that he has done so. Despite Dr. Scott's admonition against appearing even as a witness, the claimant has testified at least twice in this claim. He has filed lawsuits in Federal District Court against the West Virginia Supreme Court of Appeals. He has prosecuted this particular claim since June, 1984. He has written at least two pro se appeal briefs and one brief in his suit against the West Virginia Supreme Court of Appeals for his judicial disability pension. His motion for reconsideration dated December 13, 1995, was written pro se. It is as legally sufficient as any of the other motions which are filed by lawyers regularly practicing before the Office of Judges. Therefore, it is found by a preponderance of evidence of the record that the claimant certainly could do his previous work either as a judge or as a lawyer. The statements of Dr. Soule and Mr. Slaughter must be considered completely

unreliable. They are based on a very limited reading of medical evidence. They are also based upon the claimant's subjective complaints which cannot be objectively confirmed. In other words, they are based upon the assumption that the claimant suffers from Prinzmetal's Angina. This assumption is challenged by the fact that the claimant was able to work as a paramedic until 1991. Presumably he stopped in 1991 because of increasing liver problems caused by cirrhosis of the liver, requiring a liver transplant in 1992.

Even if the claimant could not return to his former jobs, when one considers whether or not the claimant has a residual capacity to do other work, again the answer is yes. The claimant was able to take courses as an EMT and paramedic, and indeed worked at these until sometime in 1991. Despite the inherently stressful nature of the work of a paramedic, the claimant told Dr. Ovington he did not find it stressful at all. The claimant has above average intelligence, two college degrees and a considerable experience as a trial lawyer and circuit judge. There is no reason why he could not retrain himself to some other field if he desired. There is certainly no reason why he could not search real estate titles in the county courthouse. His statements that he would simply not know where to begin to learn such a trade are without credibility. They are simply self serving declarations in his quest for a permanent total disability award. The record shows that the claimant certainly has immediate skills to do other work, either of the legal or medical nature.

While the claimant certainly has the skills and degree of mental facilities necessary to make rehabilitation possible, it is found that rehabilitation is not necessary. The claimant has suffered no permanent partial disability nor has he received as much as 120 days of temporary total disability benefits, the two conditions set forth in W.Va. Code § 23-4-9 which would in any case entitle him to

some sort of rehabilitation efforts on behalf of the Commissioner. In this case, the claimant is still qualified to practice law or to work as a paramedic. Indeed, he could even run for circuit judge again if he so chose.

For all of the aforesaid reasons, it is quite clear that permanent total disability must be denied as the claimant is not permanently and totally disabled. It is simply ludicrous to say that the claimant could be permanently and totally disabled solely as a result of the injury in this claim when indeed he has no permanent disability at all. The claimant may or may not have been treated unjustly by the West Virginia Supreme Court of Appeals. This issue is completely irrelevant to the issues before the Office of Judges. It is not the task of the Office of Judges to settle a grievance with one's employer. The issue here is permanent disability, either partial or total. The issue of permanent partial disability has already been decided by the Order of November 13, 1995, and that Order stands insofar as it dealt with that issue. The issue of permanent total disability is decided by this Order, and it is found that the claimant is not permanently and totally disabled within the meaning of West Virginia Workers' Compensation Law. Accordingly, the claimant's motion for a permanent total disability award is denied.

CONCLUSIONS OF LAW:

1. Permanent total disability was an issue in litigation at the time the claim was submitted, contrary to the statement of the Administrative Law Judge in the Order of November 13, 1995.

2. The failure of the Administrative Law Judge to act upon the issue of permanent total disability was clerical error as contemplated by the West Virginia Supreme Court of Appeals in *Stewart*, supra.

3. The claimant is not permanently and totally disabled pursuant to West Virginia Workers' Compensation Law.

It is therefore ORDERED that the Order of November 13, 1995, be AFFIRMED insofar as it affirmed the Order of July 3, 1989, finding the claimant had no permanent partial disability. It is ORDERED that that Order be MODIFIED insofar, and only insofar, as it did not deal with the issue of permanent total disability. It is further ORDERED that the claimant's motion for a permanent total disability award be DENIED.

APPEAL RIGHTS:

Any party has thirty (30) days from receipt of this Order in which to appeal therefrom. In the event an appeal is taken, appeal forms must be filed with the Office of Judges within thirty (30) days from receipt of this Order.

Date: Feb. 13, 1996.

ENTER:

/s/ Henry Haslebacher
HENRY HASLEBACHER
Administrative Law Judge

HH:dgw

cc: Douglas Lee

STATE OF WEST VIRGINIA
WORKERS' COMPENSATION OFFICE OF JUDGES

Claim No: 84-63536
S. S. No.: 579-40-0570
D. O. I: 06-11-84

IN THE MATTER OF:

PIERRE E. DOSTERT,
Claimant

and

WORKERS' COMPENSATION DIVISION

and

SUPREME COURT OF APPEALS,
Employer

DECISION OF ADMINISTRATIVE LAW JUDGE

APPEARANCES:

Claimant by counsel, Ronald Harmon.
Employer by counsel, Douglas Lee.

ISSUE:

The claimant protested the Division's Order of July 3, 1989, granting no permanent partial disability.

DECISION:

It is ORDERED that the Division's Order of July 3, 1989, be AFFIRMED.

FINDINGS OF FACT:

1. This claim, for vasospastic coronary artery disease with cardiac arrhythmias, was initially denied but subsequently held compensable by the West Virginia Supreme Court of Appeals on June 2, 1988. The court's decision appears to be based upon a finding of possible spastic coronary disease. Justice Brotherton dissented nothing that ". . . the problems of the claimant resulted from other excesses of life rather than from overwork."

2. The record contains exhaustive medical records as well as the records of other litigation concerning stresses the claimant suffered.

3. The claimant was evaluated, at the request of the Division, by Thomas B. Haywood, M.D., a cardiologist, who by report dated May 30, 1989, stated there was no evidence of previous myocardial infarction, no objective documentation of paroxysmal supraventricular tachycardia (PAT), no objective findings to support the postulated corronary spasm. Dr. Haywood notes the possibility of destructive coronary disease and suspected coronary atherosclerosis. By addendum, dated June 23, 1989, Dr. Haywood states it is his opinion that the claimant's disability, if any, arises from suspected fixed obstructive coronary disease which is largely nonoccupational and rates the claimant's impairment at 10% to 25% Acting on Dr. Haywood's original report, the Division issued the protested Order of July 3, 1989.

4. The claimant submitted a report dated November 30, 1989, from Bradley Soule, M.D., a phychiatrist, noting that the claimant was occupationally disabled due to psychological factors affecting physical condition and that the claimant was permanently and totally disabled. Dr. Soule relies on a diagnosis of Prinzmetals Angina. Dr. Soule testified in accordance with his report on September 16,

1991, and admitted on cross examination that he had not made a clinical finding of Prinzmetals Angina (transcript R15). He testified that the claimant had no psychosis or neurosis. For reasons later stated, Dr. Soule's report is not deemed reliable.

5. The claimant presented reports from Harold D. Slaughter, Jr., M. S., a psychologist, dated July 15 and August 20, 1991, which indicate the claimant is permanently and totally disabled. Inasmuch as Mr. Slaughter's report relies on Dr. Soule's unreliable report, and considering the report of Dr. Robert C. Ovington, M.D., a psychiatrist, concerning such report, the report of Mr. Slaughter is deemed unreliable. Mr. Slaughter testified, in accordance with his report on September 16, 1991. A number of medical documents were introduced at the hearing of September 16, 1991.

6. The claimant testified regarding his work and various medical matters including his subjective symptoms on March 12, 1992, in connection therewith an affidavit, by the claimant, was introduced.

7. The employer presented the report of Robert C. Ovington, M. D., a psychiatrist, dated August 11, 1993, where he finds that no psychological diagnosis was warranted and no permanent partial disability due to the compensable injury.

8. The claimant submitted a report of Alex Ambroz, M. D., an occupational and environmental medicine practitioner, dated August 25, 1994. The only diagnosis, relevant to this particular case, in Dr. Ambroz's report, is congestive heart failure. Dr. Ambroz notes the need for further testing and does not rate the claimant's impairment.

DISCUSSION:

The Division is granted the authority to determine permanent partial disability in Workers' Compensation claims.

W. Va. Code § 23-4-6. No provision of Workers' Compensation Law gives a physician, even if he is an official examiner for the Division, the power or authority to fix the degree of disability in any case. That is the responsibility and duty of the Division alone. *Sisk v. State Workmen's Compensation Commissioner*, 153 W. Va. 461, 170 S.E.2d 20 (1969); *Stewart v. State Workmen's Compensation Commissioner*, 155 W. Va. 633, 186 S.E.2d 700 (1972); *McGeary v. State Compensation Director*, 148 W.Va. 436, 135 S.E.2d 345 (1964); *Haines v. Workment's Compensation Commissioner*, 151 W. Va. 152, 150 S.E.2d 883 (1966). The Division must view evidence in the light most favorable to the claimant whenever the evidence is sufficiently in conflict that reasonable men could differ concerning whether the claimant has proven his case. *Persiani v. State Workers' Compensation Commissioner*, 162 W.Va. 230, 248 S.E.12d 844 (1978).

Initially, it is noted that the issue is permanent partial disability, and that the Office of Judges is, under the current law, not able to initially award a permanent total disability award. Although the record indicates the claimant's desire for the same, he has not followed the current procedures in order to have that issue adjudicated.

The evaluation of this case must start with the Decision of the West Virginia Supreme Court of Appeals which found the claim compensable. Unfortunately, the court did not say what condition it found compensable, but a close analysis of its opinion indicates that it was relying on testimony of possible spastic disease. A complete reading of the record does not seem to indicate sufficient expert opinion to substantiate a diagnosis of Prinzmetals Angina, which is defined in Dilin's Medical Dictionary (27th Edition), as a form of angina pectoris, characterized by pain that is not precipitated by cardiac work, is of longer duration, is usually more severe, and is associated with unusual electrocardiographic manifestations, including elevated ST segments in leads that are ordinarily

depressed in typical angina. In fact, a close reading of the record indicates, the possibility of destructive coronary disease and suspected coronary atherosclerosis.

Dr. Soule's report relies upon a diagnosis of Prinzmetal's Angina which is not established. Additionally, due to the fact that there is no vocational testing or psychological testing attached or referred to in the report, Dr. Soule's impairment rating, that the claimant is permanently and totally disabled, is not deemed reliable. Additionally, Dr. Soule in his subsequent testimony states that he has not made a clinical finding of Prinzmetals Angina. He does state that the claimant has no psychosis or neurosis and seems to down play the fact that the claimant is, at least part time, engaging in a publishing business. Psychologist Slaughter's report relies heavily on the unreliable report of Dr. Soule and it is noted that Dr. Ovington, in his report of August 11, 1993, states that Mr. Slaughter seemed eager to give an opinion that the claimant was totally and permanently disabled and that this was attributable to his occupation as a judge. It goes on to state that Mr. Slaughter seemingly gave no really meaningful explanation as to why he had come to that conclusion. For the aforementioned reasons, Mr. Slaughter's report is also not deemed reliable.

The addendum by Dr. Haywood, dated June 26, 1989, rating the claimant's impairment at 10% to 25% obviously must be discussed. By it own terms, Dr. Haywood is concerned with burden of proof problems, and other legal matters, with which he should not be concerned. In context, his impairment rating is read as an impairment rating for all of the claimant's conditions, and not specifically the impairment due to the compensable injury in this claim. This reading is supported by Dr. Haywood's use of the words "if any" after referring to the claimant's disability and to the fact that he states that the claimant's suspected fixed obstructive coronary disease is largely non-occupational. For such reason, the impairment rating dis-

cussed in the addendum, cannot be relied upon insofar as it attempts to establish impairment in regard to this compensable injury.

The most reliable medical information appears to be contained in Dr. Haywood's original report of May 30, 1989, and in the reports of Dr. Robert C. Ovington, dated August 11, 1993, and Dr. Alex Ambroz, dated August 25, 1994. It is interesting to note that the claimant's own expert, Dr. Ambroz, does not diagnose Prinzmetal's Angina and in terms of cardiac conditions, notes only (at number five) congestive heart failure. Dr. Ambroz' report supports a ruling out of Prinzmetal's Angina.

In short, after review of all the relevant and reliable medical evidence, there is no evidence that the claimant suffered any impairment as a result of any compensable occupational disease and, therefore, he is not entitled to any permanent partial disability award.

The protesting party has the burden of proof in prosecuting his protest in regards to a protested issue before the Workers' Compensation Office of Judges. Failure to meet this burden by the introduction of sufficient evidence requires affirmation of the protested Order in the absence of plain error. In this case, the claimant has not met the aforementioned burden and in fact, has supplied evidence which suports the Division's decision.

CONCLUSIONS OF LAW:

The claimant is not entitled to any permanent partial disability award.

Accordingly, it is ORDERED that the Division's Order of July 3, 1989, be AFFIRMED.

APPEAL RIGHTS:

Either party has thirty (30) days from receipt of this Order within which to appeal. In the event an appeal is taken, appeal forms must be filed with the Office of

Judges within thirty (30) days from the receipt of this notice.

Date: Nov. 13, 1995

ENTER:

/s/ Robert J. Smith
ROBERT J. SMITH
Chief Administrative
Law Judge

RJS:ddm

cc: Ronald Harmon
Douglas Lee

[STATE LOGO]

WORKERS' COMPENSATION FUND
P.O. Box 3151
Charleston, West Virginia 25332

Gaston Caperton
Governor

Emily A. Spieler
Commissioner

07/03/89

T Rodney Oppmann
Suite 214
888--17th Street, N.W.
Washington DC 20006

Supreme Court Appeals
Rm E-402 Capitol Bldg
Charleston WV 25305

Re: Claim No. 840063536
S.S.N. 579-40-0570
D.O.I. 06/11/84
Pierre E Dostert
Rt 3 Box 120
Harpers Ferry WV 25425

Dear Sir/Madam:

A medical report dated 06/23/89 from THOMAS HAYWOOD, M.D. indicates that no permanent partial disability has resulted from the claimant's compensable injury and, therefore, no award of permanent partial disability will be made. Accordingly, unless closed by a prior order of the Commisioner, this claim is hereby closed with regard to the payment of any further disability benefits.

Further medical benefits may be approved for the treatment of this compensable injury, but only in such instances where the Commissioner determines the treatment to be required and reasonably related to the compensable injury.

Either party has thirty (30) days from receipt of this order to file a written protest thereto.

CC: Pierre E Dostert
Supreme Court Appeals
Sarah Elizabeth Smith

Very truly yours,

/s/ Emily A. Spieler
EMILY A. SPIELER
Commissioner

[STATE LOGO]

WORKERS' COMPENSATION FUND
601 Morris Street
Charleston, West Virginia

Arch A. Moore, Jr.
Governor

Nelson B. Robinson, Jr.
Commissioner

July 14, 1988

Honorable Pierre E. Dostert
Route 3, Box 120
Harpers Ferry, WV 25425

West Virginia Supreme Court of Appeals
Attn: Mr. Paul Crabtree
Capitol Complex
Building 1, E-402
Charleston, WV 25305

Re: Claim No. 84-63536
S. S. No. 579-40-0570
D. O. I. 06-11-84
Pierre E. Dostert

Gentlemen:

This claim came on again this day to be considered upon the entire record, particularly upon the Commissioner's order of March 25, 1985, which rejected the claimant's application for benefits, and upon the order of the Workers' Compensation Appeal Board entered October 31, 1986, which affirmed the aforesaid order of the Commissioner, and upon the order of the Supreme Court of Appeals entered June 2, 1988, which reversed the aforesaid order of the Appeal Board and remanded the claim with directions that the Commissioner hold the claim compensable; in accordance with the aforesaid order of the Court, it is hereby ordered that the aforesaid order of the Commissioner of March 25, 1985, is hereby set aside;

it is further ordered that this claim is hereby held compensable; it is further ordered that benefits shall be awarded for the disability, if any, that is demonstrated by sufficient medical evidence to be directly attributable to the compensable condition suffered by the claimant; for the purpose of determining the extent of the aforesaid disability the claimant shall be referred to a physician or physicians of the Commissioner's choice for the performance of a disability evaluation; upon receipt of the report of said evaluation an order shall be entered based upon the findings and conclusions contained in said report; all of which is accordingly so ordered.

Very truly yours,

/s/ Nelson B. Robinson, Jr.
NELSON B. ROBINSON, JR.
Commissioner

NBRJr:WM:cm
cc: Richard L. Douglas, Esq.

[Filed June 2, 1988]

Claim No. 84-63556

Per Curiam

PIERRE E. DOSTERT

v.

[obscured]

and

WEST VIRGINIA SUPREME COURT OF APPEALS

This is an appeal by the claimant, Pierre Dostert, from an order of the Workmens' Compensation Appeal Board dated October 31, 1986. This order affirmed an order of the Workers' Compensation Commission rejecting the claimant's application for benefits.

The claimant filed his application for workers' compensation benefits on July 3, 1984 alleging that he suffers from vaso-spastic artery disease and cardiac arrhythmia as a result of his former employment as a circuit judge in the 33rd judicial circuit. The claimant alleged that his condition was directly related to the stress incident to his duties as a judge.

The Commissioner initially rejected the claim by order dated September 27, 1984 and the claimant protested. Following the submissions of additional evidence, the Commissioner entered an order on March 25, 1985 affirming the rejection. The Appeal Board also affirmed.

The claimant's treating physician, Dr. Harry B. Scott, wrote a report on August 20, 1984 in which he noted his diagnosis of the claimant's condition as vaso-spastic coronary artery disease with substantial cardiac arrhythmia and stated his opinion that "there is a direct causal con-

nection between the conditions under which Judge Dostert's work has been performed and his . . . medical symptoms and condition." Dr. Scott was of the view that the type of heart condition suffered by the claimant "had its origin and continuation in a risk in the form of stress connected with the [claimant's] employment and to have flowed from that source as a natural consequence."

In addition to Dr. Scott's findings, the Record contained a report from Dr. D.K. Basu who treated the claimant in 1984. Although Dr. Basu found no significant coronary artery disease, he did suspect coronary artery spasm.

The Commissioner's decision to deny the claim in this case was based in part on a letter from Dr. James Bacos, a cardiologist, who on June 1, 1984 informed Dr. Scott that the claimant did not have coronary artery disease. However, in a report dated October 9, 1984, Dr. Bacos stated that although his evaluation failed to disclose any evidence of coronary artery disease of the arterial sclerotic type, it did not exclude the possibility of spastic coronary disease.

In addition to the medical evidence the claimant appeared at a hearing on November 19, 1984. He testified that he had never experienced any coronary or cardiac problems before 1977 when he became a circuit judge and that he had experienced no such symptoms since he had resigned. The claimant and his secretary both testified about the volume of work involved in the claimant's position.

The law in the State requires that the evidence in a workers' compensation claim be construed liberally in favor of the claimant. *Myers* v. *State Workmen's Compensation Commissioner*, 160 W.Va. 766, 239 S.E.2d 124 (1977); *Sisk v. State Workmen's Compensation Commissioner*, 153 W.Va. 461, 170 S.E.2d 20 (1969). Applying the liberality rule to the facts we concluded that the Appeal Board was plainly wrong in denying the com-

pensability of this claim in light of the evidence that the claimant's condition is a result of his employment.

Justice Neely takes judicial notice that by order dated October 31, 1986, the Court denied a claim by Judge Dostert for judicial disability which he assumed was the result of the same condition he is relying upon in his workers' compensation claim. In Justice Neely's opinion the present holding is not inconsistent with that order. Today the Court makes a finding solely on the issue of compensability, not the extent of that disability. Furthermore, under Justice Neely's view of the law regarding the liberality rule the standard of proof in worker's compensation cases differs from that in employee disability claims.

It is, therefore, Adjudged, Ordered and Decreed that the October 31, 1986 order of the Workers' Compensation Appeal Board be, and the same hereby is, reversed, and it is further Adjudged, Ordered and Decreed that this case be remanded to the Workers' Compensation Commissioner with directions to hold the claim compensable.

All of which is certified to the Workers' Compensation Appeal Board and the Workers' Compensation Commissioner.

Justice Brotherton dissents and reserves the right to file a dissent.

Justice Miller, deeming himself disqualified, did not participate in the consideration or decision of this case.

Justice McHugh did not participate in the consideration or decision of this case.

[Claim No. 84-63536]

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 20th day of March, 1997, the following order was made and entered:

PIERRE E. DOSTERT,
Petitioner

vs.

WORKERS' COMPENSATION DIVISION AND
THE SUPREME COURT OF APPEALS,
Respondent

On a former day, to-wit, March 12, 1997, came the petitioner, Pierre E. Dostert, pro se, and presented to the Court his motion in writing requesting this Court's reconsideration of its order entered on the 8th day of January 1997, refusing petitioner's motion for an extension of time within which to file a petition for appeal in the above-captioned proceeding. Thereafter, on the 19th day of March, 1997, came the respondent, the Supreme Court of Appeals, by Steptoe & Johnson, and Misty L. Carr, its attorneys and presented to the Court its written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said motion to reconsider. Justice McHugh deemed himself disqualified and did not participate in the consideration or decision of this matter.

A True Copy

Attest:

/s/ [Illegible]
Interim Clerk
Supreme Court of Appeals

U.S. Constitution, Amend. 14, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

W. Va. Const. Art. VIII, § 2

2. Supreme Court of Appeals

The supreme court of appeals shall consist of five justices. A majority of the justices of the court shall constitute a quorum for the transaction of business.

The justices shall be elected by the voters of the State for a term of twelve years, unless sooner removed or retired as authorized in this article. The legislature may prescribe by law whether the election of such justices is to be on a partisan or nonpartisan basis.

Provision shall be made by rules of the supreme court of appeals for the selection of a member of the court to serve as chief justice thereof. If the chief justice is temporarily disqualified or unable to serve, one of the justices of the court designated in accordance with the rules of the court shall serve temporarily in his stead.

When any justice is temporarily disqualified or unable to serve, the chief justice may assign a judge of a circuit court or of an intermediate appellate court to serve from time to time in his stead.

W. Va. Const. Art. VIII, § 8

- 8. Censure, Temporary Suspension and Retirement of Justices, Judges and Magistrates; Removal

Under its inherent rule-making power, which is hereby declared, the supreme court of appeals shall, from time to time, prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof, and the supreme court of appeals is authorized to censure or temporarily suspend any justice, judge or magistrate having the judicial power of the State, including one of its own members, for any violation of any such code of ethics, code of regulations

and standards, or to retire any such justice, judge or magistrate who is eligible for retirement under the West Virginia judges' retirement system (or any successor or substituted retirement system for justices, judges and magistrates of this State) and who, because of advancing years and attendant physical or mental incapacity, should not, in the opinion of the supreme court of appeals, continue to serve as a justice, judge or magistrate.

No justice, judge or magistrate shall be censured, temporarily suspended or retired under the provisions of this section unless he shall have been afforded the right to have a hearing before the supreme court of appeals, nor unless he shall have received notice of the proceedings, with a statement of the cause or causes alleged for his censure, temporary suspension or retirement, at least twenty days before the day on which the proceeding is to commence. No justice of the supreme court of appeals may be temporarily suspended or retired unless all of the other justices concur in such temporary suspension or retirement. When rules herein authorized are prescribed, adopted and promulgated, they shall supersede all laws and parts of laws in conflict therewith, and such laws shall be and become of no further force or effect to the extent of such conflict.

A retired justice or judge may, with his permission and with the approval of the supreme court of appeals, be recalled by the chief justice of the supreme court of appeals for temporary assignment as a justice of the supreme court of appeals, or judge of an intermediate appellate court, a circuit court or a magistrate court.

A justice or judge may be removed only by impeachment in accordance with the provisions of section nine, article four of this Constitution. A majority may be removed from office in the manner provided by law for the removal of county officers.

W. Va. Code § 23-5-6

§ 23-5-6. Time periods for objections and appeals; extensions.

Notwithstanding the fact that the time periods set forth for objections, protests and appeals to or from the workers' compensation appeal board, are jurisdictional, such periods may be extended or excused upon application of either party within a period of time equal to the applicable period by requesting an extension of such time period showing good cause or excusable neglect, accompanied by the objection or appeal petition. In exercising such discretion the administrative law judge, appeal board or court, as the case may be, shall consider whether the applicant was represented by counsel and whether timely and proper notice was actually received by the applicant or the applicant's representative.

W. Va. Code § 23-5-15

§ 23-5-15. Appeals from final decisions of board to supreme court of appeals; procedure; costs

From any final decision of the board, including any order of remand, an application for review may be prosecuted by either party or by the workers' compensation division to the supreme court of appeals within thirty days from the date thereof by the filing of a petition therefor to such court against the board and the adverse party or parties as respondents, and unless the petition for review is filed within such thirty-day period, no such appeal or review shall be allowed, such time limitation being hereby declared to be a condition of the right to such appeal or review and hence jurisdictional; and the clerk of such court shall notify each of the respondents and the workers' compensation division of the filing of such petition. The board shall, within ten days after receipt of such notice, file with the clerk of the court the record of the proceedings had before it, including all the

evidence. The court or any judge thereof in vacation may thereupon determine whether or not a review shall be granted. And if granted to a nonresident of this state, he or she shall be required to execute and file with the clerk before such order or review shall become effective, a bond, with security to be approved by the clerk, conditioned to perform any judgmnet which may be awarded against him or her thereon. The board may certify to the court and request its decision of any question of law arising upon the record, and withhold its further proceeding in the case, pending the decision of court on the certified question, or until notice that the court has declined to docket the same. If a review be granted or the certified question be docketed for hearing, the clerk shall notify the board and the parties litigant or their attorneys and the workers' compensation division, of that fact by mail. If a review be granted or the certified question docketed, the case shall be heard by the court in the same manner as in other cases, except that neither the record nor briefs need be printed. Every such review granted or certified question docketed prior to thirty days before the beginning of the term, shall be placed upon the docket for such term. The attorney general shall, without extra compensation, represent the board in such cases. The court shall determine the matter so brought before it and certify its decision to the board and to the division. The cost of such proceedings on petition, including a reasonable attorney's fee, not exceeding thirty dollars to the claimant's attorney, shall be fixed by the court and taxed against the employer if the latter be unsuccessful, and if the claimant, or the division (in case the latter be the applicant for review) be unsuccessful, such costs, not including attorney's fees, shall be taxed against the division, payable out of the workers' compensation fund, or shall be taxed against the claimant, in the discretion of the court. But there shall be no cost taxed upon a certified question.

W. Va. R. App. P. 2

Rule 2. Suspension of rules.

In the interest of expediting decision, or for other good cause shown, the Supreme Court may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. These rules shall be construed to allow the Supreme Court to do substantial justice.

W. Va. R. App. P. 16(b)

Rule 16. Computation and extension of time.

* * * *

(b) *Enlargement of time.*—The Court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time.

* * * *

W. Va. R. App. P. 24(a)

Rule 24. Petition for rehearing.

(a) Time for filing; consent; answer; action by Court is granted.—A petition for rehearing, together with eight copies thereof, may be filed within thirty days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petition the Court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted unless the Court otherwise orders. No answer to a petition for rehearing is required, but if the rehearing petition is granted the other parties shall be notified and may be required to file further a counter-petition and memorandum of authorities. If a petition for rehearing is granted, the Court may make a

final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

W. Va. R. App. P. 29

Rule 29. Disqualification.

(a) Motions for disqualification.—In any proceeding, any party may file a written motion for disqualification of a justice within thirty days after discovering the ground for disqualification and not less than seven days prior to any scheduled proceedings in the matter. If a motion for disqualification is not timely filed, such delay may be a factor in deciding whether the motion should be granted.

(b) Grounds for disqualification.—A justice shall disqualify himself or herself, upon proper motion or sua sponte, in accordance with the provisions of Canon 3(E)(1) of the Code of Judicial Conduct or, sua sponte, for any other reason the justice deems appropriate.

(c) Contents of motion.—The motion shall be addressed to the justice whose disqualification is sought and shall state the facts and reasons for disqualification, including the specific provision of Canon 3(E)(1) of the Code of Judicial Conduct asserted to be applicable, and shall be accompanied by a verified certificate of counsel of record or unrepresented party that he or she has read the motion; that to the best of his or her knowledge, information, and belief formed after reasonable inquiry that it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(d) Sanctions for improper motion.—If a motion is signed in violation of paragraph (c) of this rule, the Court, with or without the participation of the the justice whose disqualification was sought, upon motion or upon

its own initiative, may refer the matter to the appropriate disciplinary authority or may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the motion, including reasonable attorney fees.

(e) Filing of motion.—An original and five copies of the motion shall be filed with the Clerk of the Supreme Court with service on all parties. Upon filing of the motion, the Clerk of the Supreme Court shall examine it to determine whether it conforms with the requirements of paragraph (c) and, retaining the original for the record, shall return the five copies to the movant with instructions for correction of any nonconformity. The movant thereafter shall promptly advise the Clerk of the Supreme Court in writing of the abandonment of the motion or shall file an original and five copies of a corrected motion, with service on all parties. Once a proper motion is received, the Clerk of the Supreme Court shall promptly deliver a copy of the motion to each of the justices.

(f) Decision on motion.—The justice shall promptly notify the Clerk of the Supreme Court of his or her decision on the motion for disqualification and the Clerk of the Supreme Court shall promptly notify the other justices and the parties of such decision.

(g) Appointment of substitute justice.—When any justice shall disqualify himself or herself pursuant to the provisions of this rule, the chief justice or acting chief justice may, in his or her discretion, assign a senior justice, senior judge, or circuit judge to service for the disqualified justice. The chief justice shall promptly notify the Clerk of the Supreme Court of his or her decision regarding the necessity of the appointment of a substitute justice and the Clerk of the Supreme Court shall promptly notify the other justices and the parties of such decision.

BEFORE THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Claim No. 84-63536

PIERRE E. DOSTERT,
Claimant/Petitioner,

vs.

WEST VIRGINIA SUPREME COURT OF APPEALS, WORKERS' COMPENSATION DIVISION, OFFICE OF JUDGES, WORKERS' COMPENSATION COMMISSION WORKERS' COMPENSATION APPEAL BOARD,
Respondents.

MOTION FOR DISQUALIFICATION OF ALL PRESENT RETIRED AND PAST JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AND FOR APPOINTMENT OF THREE OR FIVE RETIRED CIRCUIT JUDGES TO SIT AND HEAR THE ABOVE-STYLED PROCEEDING

Comes now the petitioner, Pierre E. Dostert, and moves for the disqualification of all present, retired and past Justices of the Supreme Court of Appeals of West Virginia from sitting in hearing of the above-styled petition and for the appointment of three or five retired Circuit Judges to sit and consider the above petition for appeal, and states as follows:

1. That he appears Pro Se because his prior counsel has without cause, abandoned him, and he cannot locate a lawyer in West Virginia who is not intimidated at the prospect of appearing in opposition to the Supreme Court of Appeals of West Virginia.

2. The Supreme Court of Appeals, aforesaid, is a party in this proceeding in which this petition for appeal is sought. It has been represented by counsel actively, who, on its behalf, has filed legal documents in opposition to petitioner's claim and he or other members of the firm of Steptoe & Johnson have appeared at hearings to oppose the same since 1989, the aforesaid representation being ongoing and continuous before the Workers' Compensation Commission through 1996.

3. That all sitting, retired and past Justices of the Supreme Court of Appeals are disqualified from considering the petition for appeal or in any subsequent proceedings by virtue of Canon 3 of the Code of Judicial Ethics; they are or have been members and officers of the West Virginia Supreme Court of Appeals during the pendency of this proceeding before the Supreme Court of Apeals of West Virginia and the West Virginia Workman's Compensation Commission. Others not sitting during this period will, if sitting in this matter, act to uphold the integrity and dignity of that body, which is under direct attack in the petition of Pierre E. Dostert.

4. Among the matters to be considered in the petition and appeal are *unrebutted* allegations under oath accusing the Supreme Court of Appeals aforesaid, by and through its justices, agents, servants, attorneys and employees of committing high crimes and misdemeanors consisting of bribery, conspiracy and misuse of public moneys. No sitting, former or retired justice of the Court aforesaid should render judgment as to such matters.

5. This is a petition for appeal on a claim for permanent total disability, the equivalent of disability retirement. The legislature made is abundantly clear in 1987, after the fiasco of the case of *In re Dostert*, that it did not want the justices of the Supreme Court of Appeals of West Virginia to have anything to do with disability retirement of judges, referring specifically to the above case (324 S.E. 2d. 402).

6. Notwithstanding this, the West Virginia Supreme Court of Appeals, after placing the decision of the Judicial Hearing Board awarding disability retirement at the bottom of its docket in which it, contrary to its own rules, appealed the matter to itself, remanded it to the Workers' Compensation Commission in 1988, promptly hiring counsel to oppose the claim before that body. Since the claim was for permanent total disability, the Justices of the Court were in violation of at least the spirit and intent of the legislature when they intruded themselves into a claim for retirement by petitioner. This is particularly true in view of the prior written statement by the Court Administrative Director that it agreed to the claim and the findings of petitioner's attending physician. It is noteworthy that only one justice proposed such remand to the Workers' Compensation Commission (Neely) in a separate opinion with what was supposed to be a *per curiam* opinion.

7. Because of the expression of the legislature, when two Circuit Judges and a retired Justice were appointed to sit as Supreme Court Justices; they condemned and overruled *In re Dostert in all respects.* (Harshbarger v. Gainer, 403 S.E. 2d 399, 1991).

8. Appended hereto is a list of ten retired Circuit Judges of West Virginia from which petitioner requests that three or five be designated to sit as Supreme Court Justices as provided for by law, to consider this petition.

WHEREFORE, petitioner Pierre E. Dostert prays

1. That all sitting retired and past Supreme Court Justices be ruled disqualified from hearing the petition filed herewith, and

2. That three or five retired Circuit Judges from the list appended hereto be appointed to sit as Supreme Court Justices to consider this petition for appeal.

Respectfully submitted this 30th day of December, 1996.

/s/ Pierre E. Dostert
PIERRE E. DOSTERT, Pro Se
Petitioner
Rt. 5, Box 120
Harpers Ferry, WV 25425
(304) 535-2593

POINTS AND AUTHORITIES

Canon 3, Code of Judicial Conduct:

"E. *Disqualification.*—(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including *but not limited to* instances where: . . .

(d) . . .

(i) [the judge] is a party to the proceeding, *or an officer*, director or trustee, of a party;"

(emphasis supplied)

Constitution of West Virginia, Article 8, § 2:

. . .

"When any justice is temporarily disqualified or unable to serve, the chief justice may assign a judge of a circuit court or of an intermediate appellate court to serve from time to time in his stead."

West Virginia Code, Chapter 31 Article 9

Harshbarger v. Gainer, 403 S.E. 2d 399 (1991)

"1. *Nemo debet esse judex in propria causa.*"

CERTIFICATE

Pierre E. Dostert, being first duly sworn on oath according to law, deposes and states that the above Motion for Disqualification is filed in good faith and that all matters set forth therein are just and true.

/s/ Pierre E. Dostert
PIERRE E. DOSTERT

Subscribed and sworn to before me, a Notary Public in and for Jefferson County, West Virginia this 30th day of December, 1996.

[Notary Seal]

/s/ Wayne C. Welty
WAYNE C. WELTY
Notary Public

CERTIFICATE OF SERVICE

I, Pierre E. Dostert, Pro Se, hereby certify that I have mailed an original and five copies of the above Motion for Disqualification to the Justices of the Supreme Court of Appeals of West Virginia to the Clerk of said Court this 30th day of December, 1996, postage prepaid.

/s/ Pierre E. Dostert
PIERRE E. DOSTERT

ROSTER OF PROPOSED RETIRED CIRCUIT JUDGES TO CONSIDER PETITION FOR APPEAL OF PIERRE E. DOSTERT

1. The Honorable Patrick Casey
   Charleston
2. The Honorable William Les Fury
   Weston
3. The Honorable Arthur N. Gustke
   Parkersburg
4. The Honorable John M. Hamilton
   Moorefield
5. The Honorable Donald C. Hott
   Keyser
6. The Honorable C. Berkley Lilly
   Beckley
7. The Honorable Stephen D. Narick
   Moundsville
8. The Honorable Dan C. Robinson
   Huntington
9. The Honorable Robert K. Smith
   Charleston
10. The Honorable Richard A. Warmuth
    Moundsville

BEFORE THE
SUPREME COURT OF APPEAL S
OF WEST VIRGINIA

Claim No. 84-63536

PIERRE E. DOSTERT,
Claimant/Petitioner,

VS.

WORKERS' COMPENSATION DIVISION, WORKERS' COMPENSATION OFFICE OF JUDGES, WORKERS' COMPENSATION APPEAL BOARD, THE SUPREME COURT OF APPEALS OF WEST VIRGINIA,
Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR APPEAL, TIME HAVING EXPIRED

Pierre E. Dostert respectfully moves this Honorable Court for leave to file his petition for appeal and appendix herein and states as follows:

1. The final order of the Workmen's Compensation Board of Appeals was dated October 10, 1996; he moved for an extension of the time in which to file a petition for appeal to and including December 10, 1996, which motion was granted by this court.

2. Because of circumstances beyond his control, he was unable to complete the petition within the allotted time; he has been able to complete it for dispatch to this court on the 30th day of December, 1996. The circumstances were principally the lack of adequate stenographic and typographical assistance in order to meet the deadline.

WHEREFORE, petitioner Pierre E. Dostert moves this court for leave to file his petition for appeal and appendix which is lodged herewith in the office of the Clerk of this court.

Respectfully submitted,

/s/ Pierre E. Dostert
PIERRE E. DOSTERT, Pro Se
Rt. 5, Box 120
Harpers Ferry, WV 25425
(304) 535-2593

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was mailed, postage prepaid, to Douglas G. Lee, Attorney for the West Virginia Supreme Court of Appeals, Steptoe and Johnson, P.O. Box 2190, Clarksburg, WV 26302-2190, this 30th day of December, 1996.

/s/ Pierre E. Dostert
PIERRE E. DOSTERT

BEFORE THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Claim No. 84-63536

PIERRE E. DOSTERT,
Claimant/Petitioner,

vs.

WORKERS' COMPENSATION DIVISION, WORKERS' COMPENSATION OFFICE OF JUDGES, WORKERS' COMPENSATION APPEAL BOARD, THE SUPREME COURT OF APPEALS OF WEST VIRGINIA,
Respondents.

MOTION FOR RECONSIDERATION

Comes now Pierre E. Dostert and moves this Court to reconsider its order dated January 8, 1997 in the above proceeding, and states as follows:

I. DISQUALIFICATION

1. On January 14, 1997 he received a copy of an order of this Court denying his motion for leave to file a petition for appeal, times having expired; it was postmarked January 8, 1997, and the envelope containing it bore the date January 12, 1997.

2. Due to disabiilty and infirmities of petitioner, it has not now been possible prior to this time to seek relief from the above order.

3. Petitioner has and had a due process right under the Fourteenth Amendment of the U.S. Constitution to an unbiased, disinterested and impartial tribunal to con-

sider his appeal, together with all procedural matters associated with it. Due process "requires a 'neutral and detached judge in the first instance.' " *Concrete Pipe & Products of California v. Const. Laborers Pension Trust Fund*, 113 S.Ct. 2264, 2277 (1993) (quoting Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972)).

"Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' " *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975).

For example, the U.S. Supreme Court has held that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955).

> "No man is allowed to be a judge in his own cause, his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. *With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time . . .*

The Federalist No. 10 at 79 (C. Rossiter ed. 1961), quoted in *Gutierrez de Martinez v. Lamagno*, 115 S.Ct. 2227, 2233 (1995), emphasis added.

Judges should disqualify themselves where the circumstances "offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true" between the parties. See *Ward*, 409 U.S. at 60; see also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986). This "stringent rule" may sometimes bar participation "by judges who have no actual bias. *In re Murchison*, 349 U.S. at 136, but " 'justice must satisfy the appearance of justice.' " *Id.*, quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954).

Bias may be shown either by an adjudicator's having prejudged the issues or having a *conflicting institutional* or pecuniary interest, among other things. (emphasis

supplied) See, e.g., *Ward*, 409 U.S. at 58-62 (mayor disqualified from hearing traffic offenses by virtue of conflict between executive and judicial positions; town derived significant revenue from convictions in such cases; *Taylor vs. Hayes*, 418 U.S. 488, 501-02 (1974)—judge who "became embroiled in running controversy with" litigant should not have tried him for contempt; *In re Murchison*, 349 U.S. at 138 (judge who had obtained personal knowledge about defendant's "attitude" during secret pretrial meeting was disqualified as biased and as possible witness); *International Ass'n of Machinists v. Metro-North R.R.*, 24 F. 3d 369, 372 (2d Cir. 1994)—member of union party disqualified from sitting as decisionmaker; *Yamaha Motor Corp. v. Riney*, 21 F.3d 793, 798 (8th Cir., 1994)—ruling of state commission not competent where member of it had prejudged matter and had pecuniary interest in it. The presence of even one interested or biased decisionmaker on a tribunal may make it incompetent to decide the issues before it. See *Yamaha Motor Corp.*, 21 F.3d at 798.

4. Petitioner made a general motion to recuse the justices of the Supreme Court of Appeals of West Virginia citing the proposition that a man cannot be a party and a judge in a given effective litigation. This was ignored improperly by the Court with the exception of Chief Justice McHugh, who disqualified himself. Apparently acting on the theory that there had been a change in personnel on the Supreme Court of Appeals, the remaining justices ruled to disallow an extension of time which could have and should have been granted.

5. There is no constitutional or statutory authority in the laws of West Virginia that stands for the proposition that the West Virginia Supreme Court of Appeals is the *employer* of Circuit Judges. By law, they are elected officials. The West Virginia Supreme Court of Appeals gratuitously intruded itself into the Workers' Compensation Commission proceeding, creating the present hiatus. It must be remembered that it was upon the opinion and

vote of but a single justice in 1988 that this matter was continued before the Workers' Compensation Commission even though the law on judicial disability retirement had been changed by the legislature. That justice, Richard M. Neely, was engaging in subterfuge to avoid application of the intent and language of the legislature with respect to the claim of petitioner.

6. Justice Larry Starcher was and is disqualified to consider the petition for appeal or any procedural matters surrounding the same. As indicated in petitioner's affidavit of September 5, 1991 filed with the petition for appeal, he had an apparent tryst with the bribed informant of the Supreme Court of Appeals of West Virginia, Rosa Lynch, former Circuit Clerk of Jefferson County. The locale of this was Justice Starcher's mountain cabin in Monongalia County, West Virginia. This occurred after the Supreme Court of Appeals in 1984 had granted petitioner an indefinite medical leave of absence, at a time when the then Circuit Judge Starcher was serving as substitute judge in Jefferson County because of the absence of petitioner. It is reasonable to assume Rosa Lynch told Justice Starcher that petitioner was feigning illness in order to obtain disability retirement. This particularly is true since petitioner was informed by a reliable source that Justice Starcher stated in the judges chambers of the Jefferson County courthouse "Dostert will get disability retirement over my dead body."

7. Justice Margaret L. Workman was and is disqualified from hearing the petition herein and any procedural matters surrounding it, having demonstrated her bias against petitioner in the matter of non-disability retirement of petitioner under the laws of West Virginia. Although under the rules of the Supreme Court of Appeals (see attached exhibit) petitioner was entitled to a retirement based on eight years of service, the then Chief Justice Margaret Workman, by and through the Administrative Director of the Supreme Court of Appeals of West

Virginia, reduced the figure to seven and one-half years, forcing petitioner, contrary to law, to pay the retirement fund $1,539.81 in order to receive credit for eight full years.

8. The four justices signing the order of January 8, 1997 would be deemed disqualified under the principles of collegiality, not wishing to be placed in the position of having to accuse their fellow Justice McHugh (or any prior sitting justice) of participating in improprieties concerning the disability retirement of petitioner. Stated in traditional American English, a cry went out to "circle the wagons." The Federalist Paper cited above clearly recognized this problem and dealt with it in a manner which is still excellent law.

II. EXTENSIONS OF TIME

1. The time for submitting a petition for appeal was to expire on November 10, 1996. Petitioner submitted a motion for extension prior to that date, requesting an extension until December 10, 1996. That motion was filed under Rule 16(b) of the West Virginia Supreme Court of Appeals and was granted, becoming the law of this case. The Petition for Appeal was sent by mail on December 30, 1996 together with a motion for leave to file the same, time having expired. This second motion was filed under § 23-5-6 of the West Virginia Code (1995, c. 253). It was thus filed within the statutory period provided. The motion was denied by the order dated January 8, 1997.

2. By virtue of a letter of January 7, 1997 to the Clerk of the Supreme Court of Appeals, it is apparent that the attorney for the West Virginia Supreme Court of Appeals was notified that the court would "take the matter up on January 8, 1997. *Petitioner received no such notice.* This is but another illustration of the collective bias of the present members of the court against the claim of petitioner.

3. The cited section of the Code, *supra*, indicates that a court considering such a motion "shall consider whether the applicant was represented by counsel and whether timely and proper notice was actually received by the applicant or the applicant's representative."

4. The court, in its order dated January 8, 1997 (received by petitioner on January 14, 1997, made no finding as to whether the application of petitioner was filed "within a period of time equal the applicable period; it made no finding as to whether good cause or excusable neglect were shown; it made no finding as to whether petitioner was represented by counsel.

5. In addition to the above statutory expression by the West Virginia Legislature, it stated in § 23-5-2 of the West Virginia Code "It is the policy of this chapter to prohibit the denial of just claims of injured or deceased workers or their dependents on technicalities." That is precisely what the Supreme Court of Appeals of West Virginia did in its order dated January 8, 1995. That policy applies here, but the Supreme Court of Appeals denied this appeal based on a technicality.

6. Good cause exists to grant a motion for reconsideration out of time and to hear petitioner's appeal on the merits. See W. Va R. App. 24(a) allowing time for filing of petition for rehearing to be enlarged. Petitioner is proceeding without counsel and is impaired by poor health, including the conditions at issue in the merits of this matter. The Court's rejection of his previous motion for an extension of time to file his petition for appeal worked in practice unfairly to prejudge (without evidence) the case and to disregard his medical condition, which was the reason, among others, for the delay in filing the petition.

Moreover, no *reliance interest* is present in this matter as to any party or third party by the denial of petitioner's earlier motions for leave to file the petition and for dis-

qualification. The Court accordingly should allow this late petition for rehearing, and permit the filing and hearing on the merits of the petition for appeal, and grant the motion for disqualification. See *Longwell v. Hodge*, 171 W.Va. 45, 48, 297 S.E.2d 820, 822 (1982) ("time periods become important whenever reliance interests have been created," and lack of third party reliance meant that "no reason" existed for lower court to bind itself to strict time period review).

SUMMARY

The order dated January 8, 1997 is void (not voidable) under the Due Process of Law clause of the U.S. Constitution and under the laws of the State of West Virginia.

RELIEF SOUGHT

1. That the order dated January 8, 1997 be held for naught.

2. That all members of the West Virginia Supreme Court of Appeals be disqualified herein.

3. That this cause be referred to three or five retired Circuit Judges from the list submitted by petitioner to sit as Supreme Court Justices for further proceedings.

Respectfully submitted,

/s/ Pierre E. Dostert
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